No. (1)

Supreme Court, U.S.
FILED
97 953 DEC 9 1997
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, California State Prison at San Quentin, *Petitioner*,

v.

RODNEY GENE BEELER, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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26 pp.

(CAPITAL CASE)

QUESTION PRESENTED

Whether the one-year period of limitation for filing an application for writ of habeas corpus, mandated by section 101 of the Antiterrorism and Effective Death Penalty Act of 1996, is a jurisdictional prerequisite to habeas review which cannot be extended under a theory of equitable tolling.

LIST OF PARTIES

Arthur Calderon, Warden, California State Prison at San Quentin, is the Petitioner in this Petition for Writ of Certiorari.

United States Court of Appeals for the Ninth Circuit issues a published opinion on April 17, 1997, amended on October 29, 1997, whic is the subject of this request for review.

Rodney Gene Beeler, an inmate sentenced to death under the law of California, is the Respondent in this proceeding.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

No.

ARTHUR CALDERON, Warden, California State Prison at San Quentin, *Petitioner*,

v.

RODNEY GENE BEELER, *Respondent*.

Petitioner Arthur Calderon, Warden of the California State Prison at San Quentin, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

CITATION OF REPORTS OF OPINIONS AND ORDERS

People v. Rodney Gene Beeler, 9 Cal. 4th 953, 39 Cal. Rptr. 2d 607; 891 P.2d 153 (1995), a published Opinion by the California State Supreme Court affirming Beeler's judgment of conviction and death sentence. A copy appears at Appendix 1.

Rodney Gene Beeler v. Arthur Calderon, Case No. CV-96-0606-RT, filed February 28, 1997, an unpublished Order by the United States District Court for the Central District of California, granting Beeler's motion to extend the filing date for the petition for writ of habeas corpus and ruling that the one-year time limit for filing a petition for writ of habeas corpus could be equitably tolled. A copy appears at Appendix 2.

Arthur Calderon v. United States District Court (Beeler), 112 F.3d 386 (9th Cir. 1997), Case No. 97-70277, filed April 17, 1997, amended on October 29, 1997, following denial of rehearing and rejection of suggestion for rehearing en banc, a published Opinion by the United States Court of Appeals for the Ninth Circuit denying Petitioner Calderon's Petition for Writ of Mandate to the United States District Court for Central District of California, to set aside the ruling that the one-year time limit for filing a petition for writ of habeas corpus was subject to equitable tolling. A copy appears at Appendix 3.

In re Arthur Calderon, Case No. 96-1683, filed June 23, 1997, Order by the Supreme Court of the United States, denying Petitioner Calderon's Petition for Writ of Mandate to the Ninth Circuit Court of Appeals and the United States District Court for the Central District of California, to set aside the ruling that the one-year time limit for filing a petition for writ of habeas corpus was subject to equitable tolling. A copy appears at Appendix 4.

STATEMENT OF JURISDICTION

The ruling of the United States Court of Appeals for the Ninth Circuit was entered on April 17, 1997. On October 29, 1997, the Court of Appeals denied a petition for rehearing and suggestion for rehearing en banc and issued an amended opinion. The jurisdiction of this Court is invoked under Title 28 of United States Code section 1254(1).

RELEVANT STATUTES

Section 101 of the Antiterrorism and Effective Death Penalty Act of 1996, appearing in Chapter 153 of Title 28 of United States Code section 2244, provides in relevant part:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent

judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

On June 14, 1988, Rodney Gene Beeler[1/] was found guilty following a jury trial in the state court for the December 30, 1985, murder of Anthony Stevens. (IV CT 1450-1451.) On May 5, 1989, the state court sentenced Beeler to death. (V CT 1800-1804.) On April 10, 1995, the California Supreme Court affirmed Beeler's conviction and sentence following his automatic direct appeal. People v. Beeler, 9 Cal. 4th 953, 39 Cal. Rptr. 2d 607, 891 P.2d 153 (1995). On November 15, 1995, the California Supreme Court denied Beeler's state Petition for Writ of Habeas Corpus. On January 8, 1996, this Court denied Beeler's Petition for Writ of Certiorari. Beeler v. California, ___ U.S. ___, 116 S. Ct. 723, 133 L. Ed. 2d 675 (1996).

Thereafter, Beeler indicated his intent to seek collateral review in the federal courts under Title 28 of United States Code section 2241. On September 27, 1996, the District Court for the Central District of California (hereafter, "District Court"), issued an order directing Beeler to file his petition for writ of habeas corpus by March 25, 1997.

On or about January 31, 1997, Beeler filed a motion to extend the time to file his Petition for Writ of Habeas Corpus in the District Court and to equitably toll

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1. Rodney Gene Beeler is the Petitioner for a Writ of Habeas Corpus underlying this Petition for Writ of Certiorari. In the interest of clarity, the Petitioner for this Petition for Writ of Certiorari will be referred to as "Petitioner Calderon." Rodney Gene Beeler will be referred to as "Beeler."

the one-year filing period because one of his originally appointed counsel left for other employment and was replaced by another attorney. On February 28, 1997, the District Court issued an order, equitably tolling the period of limitation for filing the petition for writ of habeas corpus, and granting Beeler's motion to extend the filing date for his petition for an additional 202 days to October 13, 1997.

On March 24, 1997, Petitioner Calderon filed a Petition for Writ of Mandate in the United States Court of Appeals for the Ninth Circuit (hereafter, "Ninth Circuit") requesting direction to the District Court to set aside its ruling finding that the one-year period of limitation was a statute of limitation that could be extended by equitable tolling. On April 17, 1997, the Ninth Circuit denied the petition in a published opinion, holding that the time limit was not a jurisdictional prerequisite, but a statute of limitation subject to equitable tolling. Arthur Calderon v. United States District Court (Beeler), 112 F.3d 386 (9th Cir. 1997).

On April 21, 1997, Petitioner Calderon filed a Petition for Writ of Mandate and a Motion for Expedited Review in this Court, contesting the Ninth Circuit's ruling permitting equitable tolling. Expedited review was denied. On June 23, 1997, this Court denied the Petition for Writ of Mandate. In re Calderon, Case No. 96-1683, filed June 23, 1997.

On April 21, 1997, Beeler filed a Petition for Rehearing and Suggestion for Rehearing En Banc in the Ninth Circuit, contesting the Ninth Circuit's ruling that his case came under the provisions of the Antiterrorism and Effective Death Penalty Act because his application for writ of habeas corpus had not yet been filed. On October 29, 1997, the Ninth Circuit denied rehearing and rehearing en banc, but issued an amended opinion. The amendment did not affect the court's ruling that the limitation period was amenable to equitable tolling. Arthur Calderon v.

United States District Court (Beeler), 112 F.3d 386 (9th Cir. 1997) (originally filed April 17, 1997, amended October 29, 1997, Case No. 97-70277).

On October 10, 1997, Beeler filed his Petition for Writ of Habeas Corpus in the United States District Court for the Central District of California, Case No. CV-96-0606-RT, along with a motion for leave to amend that petition in the future. Also on October 10, 1997, Beeler filed a Petition for Writ of Habeas Corpus in the Supreme Court for the State of California, raising claims that had not been raised previously in the state courts. California State Supreme Court No. S065016. On November 12, 1997, the District Court denied Beeler's motion for future amendment of the petition on the ground it was premature.

REASONS FOR GRANTING THE WRIT

This is a case of first impression to decide whether the time period for filing a federal habeas corpus petition under the Antiterrorism and Effective Death Penalty Act of 1996 is jurisdictional in nature, or merely directory, subject to extension by equitable tolling. The nature of the period of limitation is a matter of compelling importance that has not been, but should be, settled by this Court. U.S. Sup. Ct. R. 10.

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 (hereafter, "AEDPA" or "Act") was signed into law. Section 101 of the AEDPA established a one-year period of limitation for filing a petition for writ of habeas corpus. Section 101 has been codified in Chapter 153 of Title 28 of United States Code section 2244(d).[2] The Ninth Circuit has ruled that the

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2. Beeler's case, a capital case, is controlled by Chapter 153, and not Chapter 154 of Title 28 of United States Code (28 U.S.C. §§

one-year period of limitations is not jurisdictional in nature, but instead a statute of limitations subject to extension by means of equitable tolling. Under this ruling, petitioners like Beeler seeking collateral review in the federal courts are able to receive discretionary grants of equitable tolling of the filing period.

Petitioner Calderon contends that the one-year period of limitation for filing a habeas petition is jurisdictional in nature, comparable to the jurisdictional deadline for filing a notice of appeal. Cf. Fed. R. App. P., rule 3(a); Smith v. Barry, 502 U.S. 244, 245, 247-248, 249, 112 S. Ct. 678, 116 L. Ed. 2d 678, 683, 686 (1992); Report of the United States Senate Committee on the Judiciary on S. 1763, S. Rep. No. 98-266, 9/12/83, p. 9 [noting the need for a time limit for filing a habeas petition, as is required for filing, et al, an appeal notice (Fed.R. App. P., rule 4(b)].

A. The Habeas Process Must Begin With A Jurisdictional Period Of Limitation In Order To Effectuate Congress's Intent To End The Excessive Delays

The AEDPA represents an extensively-debated response to an abiding public outrage over endless delays in habeas corpus litigation. The purpose of the habeas reform found in the AEDPA was "to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases." U.S.C. Cong. & Admn. News, 104th Cong. 2d Sess. at 944 (1996) (House Conf. Rpt. 104-518 at 111). The amendment to section 2244 was the culmination of a reform effort that began with the Reform of Federal

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2261-2266 [special habeas corpus procedures in capital cases from qualifying states]). See, Ashmus v. Calderon, 123 F.3d 1199 (9th Cir. 1997), cert. granted, 12/5/97, Calderon v. Ashmus, Case No. 97-391.

Intervention in State Proceedings Act of 1983 and continued for over a decade until AEDPA became law. Report of the United States Senate Committee on the Judiciary on S. 1763, S. Rep. No. 98-266, 9/12/83. See also, Lonchar v. Thomas, ___ U.S. ___, 116 S. Ct. 1293, 1313, 134 L. Ed. 2d 440 (1996) Appendix [listing the bills concerning the period of limitation].

The purpose of the AEDPA cannot be accomplished when the very inception of federal collateral review is subject to indefinite delay. In federal appeals, the filing of the notice of appeal is a jurisdictional prerequisite. Fed. R. App. P., rule 3(a). If the filing period for appeals is jurisdictional in nature, it should be all the more so for federal habeas proceedings, which is not direct review, but collateral review of a case already fully litigated and reviewed in the state courts. See, Lindh v. Murphy, ___ U.S. ___, 117 S. Ct. 2059, 138 L. Ed. 2d 481, 497-498 (1997) [Rehnquist, C. J., dissenting]. In Barefoot v. Estelle, 463 U.S. 880, 887-888, 103 S. Ct. 3383, 3392, 77 L. Ed. 2d 1090 (1983), this Court noted:

> When the process of direct review -- which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari -- comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is *secondary and limited*. . . .

Emphasis added.

This limited and secondary nature of federal habeas collateral review makes it that much more imperative to establish stringent control over the proceedings from the very beginning, requiring a prospective petitioner to strictly observe jurisdictional

filing deadlines. Even a strict guideline for the exercise of discretion eviscerates the gatekeeping function of the period of limitation. To be an effective gate, the period of limitation must be absolute and definitive of jurisdiction. Nothing must be permitted to obscure or evade its purpose, either before or after the filing of the habeas application. Allowing any judicial discretion to extend the filing time opens the door to unpredictable and uneven treatment.

> As Selden pointed out so many years ago, the alternative [to a precise rule] is to use each equity chancellor's conscience as a measure of equity, which alternative would be as arbitrary and uncertain as measuring distance by the length of each chancellor's foot. [Citation.]

Lonchar v. Thomas, 116 S. Ct. at 1298.

Where there are no explicit and definitive guidelines for the courts in jurisdictional matters, there is the opportunity for unpredictable, uneven, and inevitably arbitrary treatment, even within a single case. In Thompson v. Calderon, a case now pending before this Court, a much-divided Ninth Circuit reopened an "eleventh-hour" capital case and recalled the mandate, which had reinstated the death penalty judgment, after time for rehearing and for calling en banc review expired. Thompson v. Calderon, Orders filed 7/28/97, 7/30/97, and 8/3/97, amended 8/8, 12, and 20/97, by the United States Court of Appeals for the Ninth Circuit, Case Nos. 95-99014, 95-99015, cert. granted, United States Supreme Court Case No. 97-215. Only when clear and definitive jurisdictional standards are established can such disorder and uncertainty be stopped.

The Ninth Circuit acknowledged Congress's intent to accelerate the habeas process, opining that

although a statute of limitation subject to equitable tolling would not serve Congress's goal as well as a strict jurisdictional bar, it would still speed up the process. The Ninth Circuit also created a strict standard for granting equitable tolling:

> Equitable tolling will not be available in most cases, as extensions of time will only be granted if "extraordinary circumstances" beyond a prisoner's control make it impossible to file a petition on time. [Citation.] We have no doubt that district judges will take seriously Congress's desire to accelerate the federal habeas process, and will only authorize extensions when this high hurdle is surmounted.

(Arthur Calderon v. United States District Court (Beeler), 112 F.3d 386, 391 (9th Cir. 1997), as amended October 29, 1997; App. 3 at 130-131.)

Already the discretionary guideline created by the Ninth Circuit in Beeler's case has opened the door for uncertainty and indefiniteness with respect to the time to file a habeas application. Despite the Ninth's Circuit assurance that it had "no doubt that district judges will take seriously Congress's desire to accelerate the federal habeas process, and will only authorize extensions when this high hurdle is surmounted," the district courts have equitably tolled the filing period in numerous capital cases.[3]

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3. See e.g., Ashmus v. Calderon, No. C-93-0594-TEH, United States District Court for the Northern District of California ["USDS-ND"], Order filed 4/24/97; Bacigalupo v. Calderon, No. C-94-2761-DLJ, USDC-ND, Order filed 4/21/97; Freeman v. Calderon, No. 95-3368-FMS, USDC-ND, Order filed 4/23/97; Mitcham v. Calderon,

While the courts may acknowledge the Ninth Circuit's high standard for equitable tolling, in actual practice no standard exists. In Sheldon v. Calderon, Case No. CV-96-5545-TJH, the District Court has so far already issued three grants of equitable tolling to allow time for appointment of counsel and funding (neither of which is required under Chapter 153), and for litigating the issue of exhaustion. See, Orders issued on 6/11/97, 8/26/97, and 11/12/97, United States District Court for the Central District of California. In Ashmus v. Calderon, C-93-0594-TEH, the District Court tolled the filing period for 45 days after the petition had been filed to have the parties litigate the issue of exhaustion, and to allow the inmate to file a petition for exhaustion in the state court. The tolling was granted even though the court noted that the inmate had been on notice since April 24, 1996, when the AEDPA was enacted, and he should have been prepared to file all claims by April 23, 1997, despite any uncertainty in the law. See, Order filed 3/24/97, United States District Court for the Norther District of California. In Rodrigues v. Calderon, C-96-1831-CW, the District Court equitably tolled the filing period twice, once before the petition was filed and then again after the petition had been filed. The District Court then went on to extend the second period of equitably tolling indefinitely to allow the court time to rule on the issue of exhaustion. See, Orders issued on

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No. C-94-2854-SBA, USDC-ND, Order filed 12/23/96; Mitcham v.Calderon, No. C-97-3825-VRW; USDC-ND; Order filed 11/5/97; Rodrigues v. Calderon, No. C-96-1831-CW, USDC-ND, Orders filed 3/24/97, 8/4/97, and 10/21/97; Walker v. Calderon, No. C-94-1997-SBA, USDC-ND, Order filed 4/30/97; Sheldon v. Calderon, No. CV-96-5545-TJH, USDC-Central District ["CD"], Orders filed 6/11/97, 8/26/97, and 11/12/97; Cain v. Calderon, No. CV-96-2584-ABC, USDC-CD, Order filed 4/14/97; Fudge v. Calderon, No. CV-95-5369-JGD, USDC-CD, Order filed 4/14/97; Cummings v. Calderon, No. CV-95-7118-CBM, USDC-CD, Order filed 4/17/97; Kirkpatrick v. Calderon, No. CV-96-0351-WDK, USDC-CD, Order filed 9/23/97.

3/24/97, 8/4/97, and 10/21/97, United States District Court for the Northern District of California.

The reason for the equitable tolling in Beeler's own case should not be considered "extraordinary" in a capital case under the strict standard established by the Ninth Circuit. The District Court found that one of the original counsel's desire to take other employment warranted a tolling of the filing period for seven months to allow new counsel time to become acquainted with the case. Substitutions of counsel, and counsel being busy with other matters, are not unheard of in capital case litigation.

Nor was the filing of a timely petition "impossible" in Beeler's case because of the substitution of counsel. One of Beeler's originally-appointed counsel, Karen Schryver, has continuously represented him throughout the habeas proceedings. While the overlapping period for the replacement of Beeler's other attorney might have made filing a petition somewhat more difficult, it was not impossible, especially where the District Court had earlier granted Beeler's request to file a "bare bones" petition without supporting points and authorities.

The Ninth Circuit's guideline for granting equitable tolling too easily allows for avoidable opportunities of delay. While substitution of counsel may be a circumstance beyond a prisoner's control, it is not a circumstance beyond appointed counsel or the District Court's control. Given the incentive for delay in death penalty cases (see, Lindh v. Murphy, 138 L. Ed. 2d at 497 [Rehnquist, C.J., dissenting]), and the delay that has developed in the habeas process, it cannot be unexpected that counsel will be replaced during the pendency of the proceedings.

Beeler has shown a general disregard for any limitation for filing his habeas claims, even though he has already filed his petition in the District Court. Beeler has

since indicated that should any of his claims be deemed unexhausted, he intends to request a stay of the proceedings in order to pursue exhaustion in the state court.[4] Beeler is thus seeking to further extend the time to introduce habeas claims in a way clearly not provided for by statute.

On the same day that he filed his Petition for Writ of Habeas Corpus in the District Court, Beeler also filed a successive habeas petition in the California State Supreme Court containing admittedly unexhausted claims. With his federal habeas petition, Beeler concurrently filed a motion to amend the petition, seeking advanced permission from the District Court to add more claims once the state court has resolved the claims in the successive petition before it. Although on November 12, 1997, the District Court denied Beeler's motion for future amendment of his habeas petition on the ground it was premature, it is plain that without an absolute deadline for filing a habeas petition with all claims, the floodgates are left wide open for the possibility of unlimited amendment, hence, unlimited delay, from the very beginning of the habeas process. See also, Rodrigues v. Calderon, C-96-1831-CW [similar stay and amendment requests filed by state inmate]. The result is the [illegible]ication of any meaningful period of limitation.

This Court has repeatedly noted:

> "[I]t is important, in order to preclude individualize enforcement of the Constitution in different parts of the Nation, to lay down as specifically as the nature of the problem permits the standard or directions that should govern the

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4. The issue of whether habeas proceedings can be held in abeyance pending exhaustion of remedies in the state courts is currently being litigated in the Ninth Circuit. Calderon v. District Court (Taylor), Court of Appeals Case No. 97-70567.

> District Judges in the disposition of applications of habeas corpus by prisoners under sentence of State Courts."

McCleskey v. Zant, 499 U.S. 467, 496, 111 S. Ct. 1454, 1467, 113 L. Ed. 2d 517 (1991), quoting, Brown v. Allen, 344 U.S. 443, 501-502, 73 S. Ct. 397, 437, 97 L. Ed. 469 (1953) (opinion of Frankfurter, J.); Lonchar v. Thomas, 116 S. Ct. at 1299.

A jurisdictional period of limitation is the specific standard that must be established in order to halt, from the very beginning of the process, the uncontrolled delay and abuse in federal collateral review.

B. The Language Of The AEDPA Reveals That Congress Intended The Period Of Limitation Be Jurisdictional In Nature

The language of the AEDPA demonstrates a clear intent that the period of limitation is a jurisdictional prerequisite and equitable tolling principles do not apply. Congress has plainly stated that a "1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." Congress was precise in providing only one specified way of extending the one-year filing period: by not counting "[t]he time during which a properly filed application for State post-conviction or other collateral review . . . is pending" toward the one-year period of limitation. 28 U.S.C. § 2244(d)(2).

Congress was also precise in providing several fact-specific ways the period of limitation would begin to run, ensuring that a prisoner would have a fair full year to present his petition.[5] 28 U.S.C. § 2244(d)(1)(A)-(D).

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5. Congress was careful to insure that states would not prevent

The precision and detail of the language manifest congressional intent to preclude individual equitable considerations. Cf. United States v. Brockamp, ___ U.S. ___, 117 S. Ct. 849, 850-853, 136 L. Ed. 2d 818, 822 (1997) [highly detailed language shows no allowance for equitable tolling of filing time for tax refund claims]. Compared with the previous "amorphous standard" governing the time for filing a habeas petition. See, Lindh v. Murphy, 96 F.3d 856, 866 (7th Cir. 1996), overruled on other grounds in Lindh v. Murphy, 117 S. Ct. 2059; accord, Arthur Calderon v. United States District Court (Beeler), 112 F.3d at 388, fn. 1; App. 3 at 131. The AEDPA is specific, precise, and highly detailed as it concerns the expeditious resolution of habeas matters, beginning with the filing period. Congress did not provide for any equitable considerations in enacting the period of limitation. The courts should not create authority for equitable considerations were none are provided for by Congress. Lonchar v. Thomas, 116 S. Ct. at 1300.

C. Congress Revealed Its Intent By Negative Implication

Congress's intent not to permit any kind of extension of the period of limitation is made obvious when Chapter 153 of Title 28 of United States Code is compared to Chapter 154, which was concurrently created by the Act. In Lindh v. Murphy, 117 S. Ct. 2059, this Court recognized that Congress had expressed its intent by means of negative implication arising out of the comparison of Chapters 153 and 154. The issue in Lindh was whether the requirements found in Chapter 153

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the timely filing of habeas petitions by providing that the one-year limitation period will not begin until any impediment to filing created by the state in violation of the Constitution or federal law is removed. 28 U.S.C. § 2244(d)(1)(B). States in return should not have to suffer further delay from events beyond and out of their control.

applied to pending cases. Chapter 154 contained the explicit provision created by section 107(c) of the Act, which provided: "Chapter 154. . . shall apply to cases pending on or after the date of enactment of this Act." This Court determined in Lindh that Chapter 153 did not apply to pending cases because that chapter lacked the section 107(c) provision found in Chapter 154:

> The insertion of § 107(c) with its different treatments of the two chapters thus illustrates the familiar rule that negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted.

Lindh v. Murphy, 138 L.Ed 2d at 490.

This same analysis leads to the conclusion based on negative implication that Congress did not intend that the one-year limitation period be equitably tolled. In Chapter 154, particularly Title 28 of United States Code section 2263(b), Congress was precise in listing three specific events which would toll the 180-day period for filing the habeas petition. 28 U.S.C. § 2263(a) and (b). The first event listed was certiorari proceedings; the second was post-conviction direct or collateral review proceedings in the state court. 28 U.S.C. § 2263(b)(1) and (2). The third, found in Title 28 of United States Code section 2263(b)(3), is the only one which reflects permissible use of equitable considerations:

> The time requirements . . . shall be tolled --
> (3) during an additional period not to exceed 30 days, if -- [¶] (A) a motion for an extension of time is filed . . .; and [¶] (B) a

> showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

Emphasis added.

The maxim of statutory interpretation states: Expressio unius est exclusio alterius. Congress need not expressly reject inclusion of an exception in order to carry out the clear legislative mandate embodied in the AEDPA. Cf. United States v. Brockamp, 117 S. Ct. at 850-853. Congress was very explicit where equitable tolling was permitted in the habeas reform act. It refrained when none was permitted. By negative implication, as well as by the plain language establishing the period of limitation with only one stated exception, Congress has manifested its intent that the period of limitation be jurisdictional in nature, not subject to equitable tolling. Thus, judicial authority to equitably toll the period of limitation should not be read into the statute.

Prior to the Lindh decision, the Ninth Circuit rejected the use of negative implication to determine whether the one-year filing time was subject to equitable tolling. The Ninth Circuit noted, "[t]he Supreme Court has cautioned against using this kind of negative inferential reasoning. . . ." (App. 3 at 131.) However, this Court has since announced that Congress has in fact manifested its intent through negative implication for purposes of interpreting the AEDPA. Lindh v. Murphy, 138 L. Ed. 2d at 494. Under the reasoning found in Lindh, congressional intent to prohibit equitable tolling of the statutory filing time found in section 101 is revealed by negative implication.

D. The Competing Interests And Equities Have Already Been Balanced By Congress In Establishing The One-Year Period Of Limitation

A comparison of Chapters 153 and 154 also shows that in establishing different periods of limitations for filing the habeas application, Congress has already considered and balanced the interests for the parties involved. Hence, the courts need not, and indeed should not, impose upon the statute additional and impermissible equitable considerations.

Under Chapter 154, where a petitioner is guaranteed representation by state-appointed counsel, Congress has deemed 180 days to be sufficient time for filing the federal habeas application, with very limited equitable tolling permitted.[6] See, 28 U.S.C. § 2263(a) and (b). In contrast, for all cases, both capital and non-capital, which are controlled by Chapter 153, Congress has deemed one year to be sufficient time to file the habeas petition, whether or not a petitioner is represented by counsel.

In Lonchar v. Thomas, 116 S. Ct. 1293, this Court noted that habeas law history made clear that Congress had undertaken the balancing of interests with respect to the "prejudice" element of Federal Rules of Appellate Procedure, rule 9(a), on delayed petitions. Id., at 1300. This Court also noted that the courts should not undermine the balance "through the exercise of background equitable powers." Id. Thus, where Congress has already performed the balancing of the interests in enacting a law, the courts should not impose their

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6. It is significant that Congress allowed a maximum of only 30 additional days if the filing period were to be equitably tolled. 28 U.S.C. § 2263(b)(3). The seven-month extension of time granted by the District Court is clearly excessive, even if equitable tolling of the filing time were permitted in Chapter 153.

individualized weighing of equities on top of congressional decree.

In establishing the longer filing period for Chapter 153 cases, Congress has, from the beginning of the reform, considered and balanced the competing interest of the state in finalizing its judgments with the interest of the petitioner in seeking yet another opportunity for further review. See, Report of the United States Senate Committee on the Judiciary on S. 1763, S. Rep. No. 98-266, 9/12/83, pp. 3-18. The additional six months for filing the petition under Chapter 153 is obviously the built-in equitable time for filing to allow for the uncertainties attendant with unrepresented petitioners in a large variety of state criminal cases. Congress thus did not intend equitable considerations to further extend the filing period it had already thoughtfully established.[7/]

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7. Beeler received the windfall of the one-year time limit for filing his habeas petition. Beeler received not only the one-year time limit under Chapter 153 for filing but also two counsel appointed to represent him. Counsel were appointed on March 22, 1996, a month prior to the enactment of the AEDPA, and a year prior to what the District Court established as the initial filing date. During the transition period to replace counsel, Beeler was represented by three appointed counsel. Even with multiple attorneys appointed and the one-year time limit for filing the habeas petition, the District Court granted an extension of time, setting the filing date seven months beyond the March 25, 1997, filing date. Beeler still seeks to essentially extend the time for introducing new claims further by means of future amendment of the petition and stays of the proceedings.

CONCLUSION

Accordingly, this Court should issue a writ of certiorari and hold that the one-year time limit in section 101 of the AEDPA is a jurisdictional prerequisite to federal habeas corpus review.

Dated: December 9, 1997.

Respectfully submitted,

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Supreme Court, U.S.
FILED

No. (7) 97 953 DEC 9 1997

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, California State Prison at San Quentin, *Petitioner*,

v.

RODNEY GENE BEELER, *Respondent*.

ON PETITIONER FOR WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX 1

***People* v. *Beeler* (1995)**
9 Cal.4th 953, 39 Cal.Rptr.2d 607; 891 P.2d 153

[No. S010164. Apr 10, 1995.]
THE PEOPLE, Plaintiff and Respondent, v.
RODNEY GENE BEELER, Defendant and Appellant.

SUMMARY

A jury convicted defendant of one count of first degree murder (Pen. Code, § 187) and one count of burglary (Pen. Code, § 459) committed with the personal use of a firearm (Pen. Code, § 12022.5). The jury also found to be true the special circumstance that the murder was committed during a burglary (Pen. Code, § 190.2, subd. (a)(17)(vii)). The jury returned a verdict of death. Before sentencing, defendant alleged he had newly discovered evidence that he suffered from organic brain damage. The trial court granted multiple continuances of the sentencing hearing for defendant to attempt to develop this evidence. However, the court ultimately denied defendant further continuances and a new trial, and the court entered a judgment of death. (Superior Court of Orange County, No. C-60966, Robert R. Fitzgerald, Judge.)
The Supreme Court affirmed the judgment in its entirety. The court held that the trial court did not err by failing to remove a juror who had expressed an uncertainty of her ability to fulfill her duties, but who subsequently indicated an ability to serve. It held that the prosecution did not fail to preserve exculpatory evidence. The court also held that the trial court did not abuse its discretion by admitting testimony regarding the victim's autopsy report by a pathologist who did not conduct the autopsy. The court further held that the trial court's instructions on intent to kill, as to the

felony-murder special circumstance, were sufficient, and that the evidence was sufficient to support a finding of intent to kill.

As to penalty phase issues, the court held that the death penalty verdict was not coerced by reason of the trial court's decision to have the jury continue deliberations with a juror whose father had died, instead of dismissing the juror and selecting an alternate. The court held that the trial court did not err by refusing to allow defendant's counsel to examine a licensed clinical psychologist on the effect of a death penalty on defendant's family. The court further held that jailers' seizure of defendant's 50-page manuscript of his life did not prevent him from presenting a complete defense during the penalty phase. The court held that the death penalty was not disproportionate as applied to defendant. The court also held that the trial court's instructions did not lead to confusion of aggravating and mitigating factors. The court further held that the trial court did not err in failing to dismiss the special circumstance allegation as a sanction for the destruction of defendant's juvenile records in Nevada. The court also held that the trial court did not err in denying defendant further continuances or a new trial concerning the alleged organic brain damage. The court finally held that whether it was ineffective assistance of counsel for trial counsel to fail to investigate the possibility of brain damage was properly left to a habeas corpus proceeding.

(Opinion by The Court. Separate concurring and dissenting opinions by Mosk, Kennard and Baxter, JJ.)

HEADNOTES

(1) Jury §26–Excusing of Jurors–Trial Court's Discretion to Remove Juror–Juror Who Expressed Doubts About Ability to Fulfill Duties.–In a capital homicide prosecution, defendant's constitutional rights were not violated by the trial court's failure to remove a juror who had expressed, in a telephone conversation

with the court clerk, an uncertainty of her ability to fulfill her duties, but who subsequently indicated to the court an ability to serve. A juror's inability to perform his or her functions must appear in the record as a demonstrable reality, and bias may not be presumed. The record reflected no demonstrable reality that the juror was unable to serve as a juror. Moreover, under Pen. Code, § 1089, which allows a trial court to remove a juror on a finding of good cause, the determination of good cause is one calling for the exercise of the court's discretion, and if there is any substantial evidence supporting that decision, it will be upheld on appeal. Substantial evidence supported the trial court's determination that the juror could fulfill her duty. In response to careful questioning by the court, she made clear her belief that she could be impartial and was able to serve despite her prior misgivings. In that circumstance, the trial court was within its discretion not to remove her from the jury.

(2a, 2b) Criminal Law (1993) §45.2–Rights of Accused–Fair Trial–Failure to Preserve Evidence–Autopsy of Homicide Victim.–In a capital homicide prosecution, the autopsy of the victim was not inadequate, and thus defendant's due process rights were not violated. Autopsy photographs showed discolorations on the victim's hands, and the pathologist testified that the discolorations had not been examined. Thus, the pathologist could not tell whether the discolorations were bruises or whether they occurred close to the time of death. Defendant, who had shot the victim while burglarizing his house, asserted that this failure undermined his ability to substantiate his claim that the victim was shot in the heat of a struggle, and thus the killing was not intentional. This evidence would not have had any meaningful exculpatory value. If an examination had revealed the victim's hands were bruised during the burglary, such evidence would not point necessarily to the conclusion he had struggled with

defendant. Moreover, even that conclusion would have aided defendant only minimally, if at all. That the victim was struggling to protect himself or his home did not by itself negate the finding that he was intentionally killed. Further, defense counsel's argument to the jury made no reference to the discolorations and did not suggest the victim had been bruised during an alleged struggle.

(3a, 3b) Criminal Law (1993) §45.2–Rights of Accused–Fair Trial–Failure to Preserve Evidence–Test-firing of Rifle.–In a capital homicide prosecution, the prosecution did not destroy evidence by test-firing a rifle found in the victim's house so as to violate defendant's due process rights. Defendant asserted the test-firing destroyed material exculpatory evidence by precluding a determination whether the rifle had been fired by the victim on the day of the killing. First, defendant made no showing that such a determination was not made. Even if no such determination was made, defendant failed to show the test-firing precluded the further testing he claimed should or could have been done. Further, defendant failed to establish the existence of any subsequent laboratory test that would have shown whether the rifle was fired on the day of the killing, and thus defendant could not fairly charge the prosecution with precluding testing that may not have been possible. Moreover, even if the test-firing precluded further testing and such testing would have shown the rifle was fired the day of the killing, defendant failed to show the testing would have had any exculpatory value that would have reasonably been apparent to the police.

(4) Criminal Law (1993) §45.2–Rights of Accused–Fair Trial–Failure to Preserve Evidence.–The federal constitutional guaranty of due process imposes a duty on the state to preserve only such evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of

constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. The state's responsibility is further limited when the defendant's challenge is to the failure of the state to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. In this circumstance, unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. The presence or absence of bad faith by the police for purposes of the due process clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.

(5a-5c) Homicide
§54–Evidence–Admissibility–Hearsay–Testimony Regarding Autopsy Report by Pathologist Who Did Not Conduct Autopsy Criminal Law (1993)
§414–Evidence–Admissibility–Hearsay–Business Records.–In a capital homicide prosecution, the trial court did not abuse its discretion by admitting the testimony regarding the victim's autopsy report by a pathologist who did not conduct the autopsy. The court admitted the report under the business record exception to the hearsay rule (Evid. Code, § 1271). The court was aware that the pathologist who conducted the autopsy left the coroner's office under unfavorable terms, but, by admitting the report, the court impliedly found that the report was trustworthy. Since the court acted within its discretion in finding the report trustworthy, the absence of the pathologist who conducted the autopsy did not violate defendant's right to confront witnesses. Furthermore, the testimony did not contain the hearsay medical opinions of the pathologist who conducted the

autopsy. The report contained a factual account of the bullet's entry into the victim's body, including the fact that it pierced the victim's heart. This did not prejudice defendant, since there was no dispute that the victim died from a gunshot wound.

(6) Criminal Law (1993)
§414–Evidence–Admissibility–Hearsay–Business Records.–Pursuant to Evid. Code, § 1271, which provides that a document is admissible as a business record only if the sources of information and method and time of preparation were such as to indicate its trustworthiness, the proponent of the evidence has the burden of establishing trustworthiness. The trial court, however, has wide discretion in determining whether a sufficient foundation has been laid to qualify evidence as a business record. On appeal, exercise of that discretion can be overturned only upon a clear showing of abuse.

(7) Criminal Law (1993)
§414–Evidence–Admissibility–Hearsay–Business Records–Medical Opinion.–Some medical opinion contained in a medical report is not admissible under the business records exception to the hearsay rule (Evid. Code, § 1271). To be admissible under the business records exception, the evidence must be a record of an act, condition, or event. A medical conclusion is not an act, condition, or event, and it may or may not be based upon conditions, acts, or events observed by the person drawing the conclusion. However, some diagnoses are a statement of a fact or a condition. For example, a diagnosis that a man has suffered a compound fracture of the femur is a record of what the person making the diagnosis has seen. But this is not true where the diagnosis is but the reasoning of the person making it arrived at from the consideration of many different factors.

(8a, 8b) Homicide
§78–Trial–Instructions–Intent–Felony-murder Special Circumstance.–In a capital homicide prosecution, which was conducted at a time when the rule was that a felony-murder special-circumstance finding required proof of the defendant's intent to kill, the trial court's instructions on intent were sufficient. First, the special circumstance instruction specifically advised the jury that it must find that defendant intended to kill a human being. Further, the trial court's instructions did not improperly lead the jury into believing that implied malice was sufficient to establish intent to kill for the purpose of the special circumstance. Although the court earlier instructed the jury that implied malice was sufficient to establish the mental state for the underlying murder charge, the special circumstance instruction did not refer to a killing with malice, and, therefore, the instruction would not have caused the jury to refer to the earlier instruction on murder. The language of the implied malice definition is inconsistent with the instruction requiring a finding of intent to kill. Moreover, the prosecutor's closing argument explaining the intent-to-kill requirement foreclosed any realistic possibility of the jury believing it did not have to find intent to kill for the special circumstance.

(9) Criminal Law (1993) §244–Instructions–Court's Explanation of Instruction.–In the absence of a party's request, a trial court is under no obligation to amplify or explain an instruction.

(10) Homicide
§66–Evidence–Sufficiency–Felony-murder Special Circumstance–Intent.–In a capital homicide prosecution, which was conducted at a time when the rule was that a felony-murder special circumstance finding required proof of the defendant's intent to kill, there was sufficient evidence to support a finding of intent to kill the victim, whose house defendant was

burglarizing at the time of the killing. The prosecution asserted that two shots from a .22-caliber revolver were fired from the house, but only one bullet was conclusively found to have come from the revolver, rather than the victim's rifle, and there was only one bullet hole in the screen door. Thus, the evidence did not mandate, but also did not preclude, the inference the prosecution asserted. The trajectory of one bullet and an indentation on the lawn that appeared to show where a knee struck the ground led to the inference that at least one bullet, and possibly both, had been fired from the house, and that one bullet struck the victim. Also, the fact that the victim was shot in the back from a distance of more than two feet led to the inference that he was shot while fleeing. Further, the fact that the bullet pierced the victim's heart did not by itself prove that defendant aimed for the heart, but it permitted that inference.

(11a, 11b) Criminal Law (1993) §236–Trial–Jury Deliberations–Replacement of Juror During Deliberations–Continuing Deliberations With Juror Whose Father Died Jury §26–Excusing of Jurors.–In the penalty phase of a capital homicide prosecution, a death penalty verdict was not coerced by reason of the trial court's decision to continue deliberations with a juror whose father had died. After hearing of the father's death, the court commenced a proceeding in which defendant and all counsel were absent, and the court sent the juror back to deliberate for one hour until it was time for the juror to leave to go to the airport. The court determined that if the jury could not reach a verdict in that time, the jury was to resume deliberations six days later upon the juror's return. This was not abuse of discretion. To the contrary, the court accommodated the juror to the fullest extent by offering to recess the trial and to truncate the deliberations on the day in question so that the juror could leave town. Also, the court could observe the juror's demeanor, and

there was nothing to indicate that there was any communication between the court and the juror that was not included in the record but which might have cast doubt on the juror's ability to proceed. Also, although a more detailed inquiry may have been beneficial, none was required, as a court's discretion in deciding whether to discharge a juror encompasses the discretion to decide what specific procedures to employ including whether to conduct a hearing or detailed inquiry. Finally, there was no evidence of coercion: the juror did not request to be discharged or to be excused from deliberating that day, and there is no presumption that a juror who has suffered a loss in the family is unable to discharge the duties of a juror.[See 5 **Witkin & Epstein,** Cal. Criminal Law (2d ed. 1989) § 2875.]

(12) **Jury §26–Excusing of Jurors–Trial Court's Discretion to Remove Juror –Review.**–A trial court's decision whether to discharge a juror for good cause under Pen. Code, § 1089, is subject to review under the abuse-of-discretion standard.

(13) **Criminal Law (1993) §236–Trial–Jury Deliberations–Replacement of Juror During Deliberations–Continuing Deliberations With Juror Whose Father Died–Court's Ex Parte Communication With Juror Jury §26–Excusing of Jurors.**–In the penalty phase of a capital homicide prosecution, the trial court did not err by engaging in an ex parte communication with a juror whose father had died. After hearing of the death, the court commenced a proceeding in which defendant and all counsel were absent, and the court sent the juror back to deliberate for one hour until it was time for the juror to leave to go to the airport. The court determined that if the jury could not reach a verdict in that time, the jury was to resume deliberations six days later upon the juror's return. If the juror was distressed and had a pressing need to arrange his affairs, the situation might have

been exacerbated if the court had refused even to speak with him until counsel arrived at the court. It is not error for a trial court to engage in a brief, administrative communication when informed of a death in a juror's family. Reality and common sense dictate that a court be allowed to learn what has happened. Although a court at some point might err by going beyond what is administratively necessary, that point was not reached in this case.

(14) Criminal Law (1993)
§521.3–Punishment–Penalty Trial of Capital Prosecution–Evidence–Mitigating Evidence–Effect of Death Penalty on Defendant's Family.–In the penalty phase of a capital homicide prosecution, the trial court did not err by refusing to allow defendant's counsel to examine a licensed clinical psychologist on the effect of a death penalty on defendant's family. The psychologist had worked in the State of Nevada prison system for nine years as a psychologist, superintendent of a women's prison, and warden of a maximum security prison. He testified he had the opportunity during this period to interview the families of people on death row. Even if evidence of the effect of a death penalty on the defendant's family is constitutionally pertinent mitigation evidence, the proposed testimony was not admissible, because the psychologist had no personal knowledge of defendant's family. The most that he could have stated would have been his opinion regarding the effect on those families of whom he did have personal knowledge. This would have been an opinion regarding the death penalty in general. Such an opinion would not be relevant to the proper inquiry, which is to tailor the defendant's punishment to his or her responsibility and moral guilt.

(15) Criminal Law (1993)
§521.3–Punishment–Penalty Trial of Capital Prosecution–Evidence–Mitigating Evidence–Seizure of

Defendant's Written Notes.—Jailers' seizure of defendant's 50-page manuscript of his life did not prevent him from presenting a complete defense in the penalty phase of defendant's capital homicide prosecution. Trial counsel had brought the matter to the court's attention, and the court had ordered that the manuscript be kept under seal by the court. However, although appellate counsel was unable to obtain the manuscript, nothing in the record suggested that trial counsel had ever requested access to the manuscript or that it was unavailable to the defense at the penalty phase of the trial. Thus, the seizure, even if improper, did not prejudice defendant. Also, prejudice was lacking in other respects. First, although defendant asserted that the loss was irreparable because he suffered from severe organic brain damage and thus there was a question whether he could reproduce the work product, that assertion assumed as a fact that he was, in fact, brain damaged. Moreover, appellate counsel did not assert that defendant ever actually attempted to rewrite or reconstruct the work, or explain why trial counsel could not have obtained the same information by interviewing defendant. Second, defendant did not assert that the manuscript would itself have been admissible, but only that it would have assisted counsel at trial. Third, defendant did not point to any mitigating evidence that he was unable to introduce as a result of the seizure of the manuscript.

(16) **Homicide §101—Punishment—Death Penalty—Proportionality.**—The death penalty was not disproportionate punishment of defendant, who was convicted of one count of first degree murder and one count of burglary, committed with the personal use of a firearm, with the special circumstance that the murder was committed during a burglary. The jury found that defendant was the actual killer and that he intended to kill. Accordingly, the imposition of the penalty of death on defendant did not violate U.S. Const., 8th Amend.

Further, defendant had a history of violent crime, having previously robbed and raped a woman. He did not lead a law-abiding life, since he had three burglary convictions. More important, even if defendant had no criminal past, he was a killer who entered an innocent stranger's home and burglarized it. The resident inadvertently returned home, interrupted the crime, and, after struggling, was shot in the back. The killer left the victim to die. Furthermore, neither defendant's abused childhood, his own family's circumstances, nor his nine-year interlude from crime rendered disproportionate a death penalty for defendant's killing of the innocent victim under the circumstances of this case.

(17a, 17b) Criminal Law (1993) §523.6–Punishment–Penalty Trial of Capital Prosecution–Instructions–Aggravating Evidence–"Catchall" Provision as Confusing Aggravating and Mitigating Factors.–In the penalty phase of a capital homicide prosecution, the trial court's instructions did not lead to confusion of aggravating and mitigating factors. The court instructed with the 1986 revision of CALJIC No. 8.84.1, which included the language of Pen. Code, § 190.3, factor (k), directing the jury to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." In addition, the court instructed "the list of factors which I have just read to you contains every aggravating factor which you may consider." Nothing in the additional instruction suggested that § 190.3, factor (k), could be considered as an aggravating factor, and the language of the § 190.3, factor (k), instruction negated any such meaning. Further, the court instructed the jury that the absence of any mitigating factor is not

an aggravating factor. Thus, it was not likely that the jury believed it was to consider extenuating evidence as aggravating evidence.

(18) Criminal Law (1993) §521.3–Punishment–Penalty Trial of Capital Prosecution–Evidence–Mitigating Evidence–"Catchall" Provision.–The language of Pen. Code, § 190.3, factor (k), which directs the trier of fact, in determining the appropriateness of the death penalty, to consider any circumstance that extenuates the gravity of the crime even though it is not a legal excuse for the crime, refers only to circumstances that extenuate the gravity of the crime, and not to circumstances that enhance it.

(19) Criminal Law (1993) §244–Instructions–Ambiguous Instructions.–The proper standard for scrutinizing ambiguous jury instructions is to inquire whether there is a reasonable likelihood that the jury misconstrued or misapplied the words.

(20a, 20b) Criminal Law (1993) §45.2–Rights of Accused–Fair Trial–Failure to Preserve Evidence–Capital Defendant's Juvenile Records.–In a capital homicide prosecution, the trial court did not err in failing to dismiss the special circumstance allegation as a sanction for the destruction of defendant's juvenile records in Nevada. Despite a Nevada law that appeared to require the sealing and retention of such records, the records were destroyed nearly 20 years prior to the capital prosecution. Defendant moved to dismiss the allegation on the ground that the destroyed records may have provided mitigating evidence. Regardless of whether the destruction by the Nevada authorities was proper under that state's law, at the time those records were destroyed neither the records themselves nor their destruction had any cognizable nexus whatsoever with the present case. Thus, there was no constitutionally

improper conduct. As suggested by the trial court, when the records were destroyed, the Nevada officials could not reasonably have been expected to foresee the records might contain some mitigating evidence 20 years later.

(21) Criminal Law (1993) §45.2–Rights of Accused–Fair Trial–Failure to Preserve Evidence–Constitutional Requirements.–The federal constitutional guaranty of due process imposes a duty on the state to preserve only such evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must possess an exculpatory value that was apparent before the evidence was destroyed. Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. The presence or absence of bad faith by the police for purposes of the due process clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.

(22) Homicide §101–Punishment–Death Penalty–Automatic Motion to Modify Verdict–Trial Court's Reading of Probation Report Before Sentencing.–In a capital homicide prosecution, no prejudicial error resulted from the trial court's reading of defendant's probation report before ruling on the automatic application for modification of a verdict of death. The preferable procedure is to defer reading the probation report until after ruling on the application. In making that ruling, the judge is limited to consideration of the evidence that was before the penalty jury. The probation report had not been admitted into evidence. However, absent a contrary indication in the record, the reviewing court assumes the trial court was not influenced by the report in ruling on the application. The record in this case showed the trial court relied

only on the evidence, not the probation report. Moreover, the court carefully reviewed the evidence, including the aggravating and mitigating circumstances and concluded that, considering all of the evidence, the factors in aggravation, beyond all reasonable doubt, overwhelmingly outweighed those in mitigation. On these facts, there was no error and no prejudice.

(23) Criminal Law (1993)
§214–Trial–Continuance–Sentencing Hearing –Discretion of Trial Court.–The granting or denial of a continuance during trial traditionally rests within the sound discretion of the trial judge. The burden is on the defendant who challenges the denial of a continuance to establish an abuse of judicial discretion. In exercising its discretion, an important factor for a trial court to consider is whether a continuance would be useful, and to demonstrate the usefulness of a continuance a party must show both the materiality of the evidence necessitating the continuance and that such evidence could be obtained within a reasonable time.

(24) Criminal Law (1993)
§215–Trial–Continuance–Sentencing Hearing –Grounds–To Ascertain Effect of Defendant's Alleged Organic Brain Damage.–In a capital homicide prosecution, in which the jury had rendered a verdict of death, and in which the court had granted defendant multiple continuances to investigate the significance of posttrial allegations that defendant suffered from organic brain damage, the trial court did not abuse its discretion in denying defendant's request for another continuance. First, counsel's declaration in support of the request was all the court had before it, and that declaration was equivocal. It repeatedly stated that the so-called newly discovered evidence "appears relevant" and "suggests" problems with defendant's mental state. Moreover, counsel seemed to assume that proof of some type of organic brain damage would be relevant to

a material issue. Counsel's declaration permitted only speculation in that regard. Second, there was no adequate showing that the evidence, even if material, could be obtained within a reasonable time. The lengthy delays and prior continuances permitted serious doubt whether the additional time requested would have yielded meaningful evidence.

(25a, 25b) Criminal Law (1993) §461–New Trial–Grounds–New Evidence–Capital Defendant's Posttrial Allegations of Organic Brain Disorder.–In a capital homicide prosecution, in which the jury had rendered a verdict of death, the trial court did not abuse its discretion in denying defendant's motion for a new trial based on alleged newly discovered evidence that defendant suffered from severe organic brain damage. Defendant failed to show that a different result would be probable on retrial. The motion for a new trial, including the issue of a probable different outcome on retrial, must be decided on the evidence actually before the court at that time, not on the basis of evidence that might be developed. All the court had before it was counsel's vague and equivocal declaration regarding the alleged results of the brain testing. It was so tenuous that it clearly did not make a different outcome probable, or even remotely likely. An affidavit that is so vague and general supports the denial of a motion for new trial. Moreover, counsel's declaration did not comport with the statutory requirement for a new trial motion (Pen. Code, § 1181), and defendant did not produce a single affidavit by any witness who could have presented credible evidence of his alleged organic brain damage, submitting instead only the declaration of counsel.

(26) Criminal Law (1993) §465–New Trial–Procedure–Discretion of Trial Court.–In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors:

that the evidence, and not merely its materiality, be newly discovered; that the evidence be not cumulative merely; that it be such as to render a different result probable on a retrial of the cause; that the party could not with reasonable diligence have discovered and produced it at the trial; and that these facts be shown by the best evidence of which the case admits. Unless a clear abuse of discretion is shown, a denial of the motion will not be interfered with on appeal.

(27) Homicide §101–Punishment–Death Penalty–Automatic Motion to Modify Verdict–Trial Court's Consideration of New Mitigating Evidence.–In denying defendant's automatic motion to modify a verdict of death, the trial court did not err in failing to consider defendant's posttrial claim that he suffered from organic brain damage. Defendant asserted that ruling on the motion was error in that the court either failed to consider pertinent relevant evidence, or if it had considered the evidence, the court would improperly be considering evidence not before the jury. In other words, defendant claimed that the trial court could not rule on the motion. However, there was no evidence for the court to consider. Defendant's "evidence" was no more than a vague and speculative declaration of counsel.

(28a, 28b) Criminal Law (1993) §110–Rights of Accused–Failure to Investigate Capital Defendant's Brain Damage.–In a capital homicide prosecution, defendant was not provided with ineffective assistance of counsel as a result of counsel's failure to investigate his alleged organic brain damage. At trial, two experts testified that defendant suffered from disassociative memory loss, and one of them also testified that defendant had suffered physical, emotional, and sexual abuse by his stepmother. This was not sufficient to cause defense counsel to investigate a possible neurological link to defendant's mental problems.

Further, counsel was not deficient for failing to produce posttrial expert evidence concerning defendant's possible brain damage. There was no evidence, other than counsel's declaration supporting a request for a continuance, that defendant in fact had brain damage. Even if counsel had a duty to investigate defendant's alleged blackouts, nothing in the record, and only bare speculation as to the outcome of any investigation, suggested that counsel failed to meet that duty. Moreover, defendant failed to establish any prejudice from the fact that the jury did not hear of his brain damage, since he never established the fact of the brain damage.

(29) **Criminal Law (1993) §104–Rights of Accused–Competence of Defense Council–Burden of Proof.**–To establish entitlement to relief for ineffective assistance of counsel, the burden is on the defendant to show trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates, and it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings.

COUNSEL

Pierce O'Donnell, under appointment by the Supreme Court, Kenneth A. Freeling, Clara A. Pope, John Schaeffer, Steve Rottman, Wilmer Harris and Kaye, Scholer, Fierman, Hays & Handler for Defendant and Appellant.
Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Keith I. Motley and Patti W. Ranger, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION
MAJORITY:

THE COURT.– Defendant Rodney Gene Beeler was convicted of one count of first degree murder (Pen. Code, § 187) and one count of burglary (Pen. Code, § 459) committed with the personal use of a firearm (Pen. Code, § 12022.5). The jury found to be true the special circumstance that the murder was committed during a burglary. (Pen. Code, § 190.2, subd. (a)(17)(vii).) The jury returned a verdict of death. This appeal is automatic. (Pen. Code, § 1239, subd. (b).) We affirm the judgment in its entirety.

Guilt Phase Facts

1. *The Prosecution*

The prosecution's theory of the case was that defendant entered the unoccupied residence of Anthony Joseph Stevenson (Tony) to commit a burglary, that Tony returned home and discovered defendant, and that, as Tony fled the house, defendant shot him. The key prosecution evidence was as follows:

Shortly before 11 a.m. on December 30, 1985, Tony was found lying on a lawn near the house where he resided with his brothers Dino Stevenson (Dino) and Michael Stevenson (Michael) in the City of Orange. Tony had been shot in the back. Police and paramedics were called to the scene. Tony died on the lawn.

The house's rear sliding-glass door had been pried open with a screwdriver. The house, including the brothers' bedrooms, had been ransacked. Bullets for Tony's .22-caliber semiautomatic Marlin rifle were strewn across his bed. The rifle was shattered on the hallway floor. Michael's bedroom door had a large gash that was attributed to the butt of Tony's rifle.

Missing from the house were jewelry (including a gold chain and an Italian gold charm), a 35-millimeter camera, $1,200 in cash, a dark blue gym bag, and Dino's fake Rolex watch. Also taken was Michael's .22-caliber single-action Ruger revolver, which he had kept unloaded under his bed with two bullets nearby.

A fingerprint identified as being defendant's was found on the top of a metal file cabinet in the southwest bedroom.

An autopsy showed that Tony died from a single gunshot wound—a .22-caliber long-rifle bullet that entered the left side of his back at an upward 45-degree angle, struck his left lung, and pierced his heart. There was no exit wound. The muzzle was more than two feet away from Tony when the shot was fired. The bullet was not fired from Tony's .22-caliber rifle but could have been fired from a .22-caliber single-action Ruger revolver similar to the one taken from Michael's bedroom. (That gun was never recovered.)

Police found a bullet hole in a car parked on the street in front of the Stevenson house. The car's owner testified she had parked the car at that location about 9:30 the morning of the killing. Ballistics tests showed the bullet was consistent with a .22-caliber long-rifle projectile, but police could make no further conclusions as to the nature or source of the bullet because of extensive damage to it caused by passing through the car door. In particular, they could not determine whether it had been fired from either Michael's revolver or Tony's rifle.

The front, main door of the Stevenson house was open, but the screen door was closed. The screen door had what appeared to be a small bullet hole, although no gun powder residue was found on the screen. Police ran a string from the hole in the screen door to the bullet hole in the car door and concluded that the bullet found in the car could have been fired from inside the house through the screen door into the car.

The homicide investigator conducting the string experiment found on the "very well taken care of and landscaped and trimmed" front lawn of the Stevenson residence an indentation, "a rounded portion where it appeared something had fallen down, *possibly a knee*, right into the lawn underneath the string. And then right next to the indentation, the rounded portion, there was

a disturbance where the grass had actually been pulled up." (Italics added.) The implication was that Tony had been shot from inside the house as he was running across the yard trying to escape from a burglar.

Tony and his brothers resided at 1144 Everett Street. Floyd Raney resided at 1104 Everett Street. About the time of the killing, Raney was in his garage, with the door open, when he heard a motor running. He went into his driveway and saw a pickup truck parked directly across the street. Defendant approached Raney's garage. He wore pale blue jeans and what appeared to be a solid blue shirt. Defendant asked Raney, "My cat jumped the wall in your backyard. Would you look back there, please, and see if my cat is back there?" Raney stepped into his backyard to look for the cat, but when he returned to the garage, defendant "was takin' off across the street in the truck." At trial, Raney identified a photograph of defendant's truck as being similar to the truck Raney saw that day.

Everett Street runs east to west. The parallel street immediately to the south is East Rose Avenue. A block wall, about six feet high, runs between the backyards of the houses on the south side of Everett and those on the north side of East Rose. Lavada Hoskins resided at 1115 East Rose. The common wall ran along the rear edge of her backyard. The morning of the killing, Mrs. Hoskins was in her backyard, talking to her next-door neighbor, Mrs. Fern Awalt. Both women saw a man walking along the top of the block wall. Mrs. Awalt recalled the time as being between about 10:30 a.m. and 11:30 a.m. Neither woman saw the man's face, but Mrs. Hoskins recalled him wearing a blue plaid shirt and carrying a small, dark sports bag. Mrs. Awalt did not see a bag, but she recalled the man was wearing work pants and a shirt that were solid blue. Mrs. Awalt required eyeglasses to read and was not wearing her glasses when she saw the man on the wall.

Neither Hoskins, Awalt, nor Raney saw any other unknown persons in the area at the approximate time of the killing.

Defendant worked at a laminated products company (the company) as a senior line operator. Jim Anderson also worked at the company and reported to defendant. Anderson recalled that defendant left work early the day of the killing, about 10 a.m., and did not return until the afternoon.

Calvin Brunsting, the company's manager in charge of time cards, testified that defendant's card for December 30, 1985, indicated that he clocked into work that day at approximately 5:45 a.m. Sometime after December 30, 1985, defendant asked Brunsting to write on defendant's card the time he left on December 30 and the time he came to work the following day. Defendant said he had forgotten to punch the clock for those times. Brunsting complied with defendant's request and indicated on defendant's card for December 30 that he left work at 3:40 p.m.

John Lorenzi worked with defendant. Lorenzi testified that, one day between Christmas and New Year's Eve 1985, defendant said to him at work, "John, let me ask you a hypothetical question. If I was—if you were robbing somebody's house, someone who lived there caught you in the act, would you shoot him?" Lorenzi replied, "Why? Did you kill somebody?" Defendant became upset and responded, "No, asshole."

Defendant later had a similar exchange with co-worker Jim Anderson, asking him, "Hypothetically speaking, if you were robbing a house and the guy came home—the guy that lived there, this is, came home and you had a gun, would you shoot him?" Anderson replied, "No, I wouldn't. I wouldn't put myself in that position to begin with. Why, did you do something, did you kill somebody?" Defendant denied having done so and walked away.

Sometime after January 1, 1986, defendant attempted to sell Dino's watch to Anderson for $500.

On January 7, 1986, defendant sold to an acquaintance the Italian gold charm taken from the Stevensons' house. Defendant's employer provided lockers for its workers. Police found in defendant's locker the camera and lens taken from the house.

2. The Defense

The primary defense theory was that defendant's employment supervisor, Mitchell Jackley, participated in the burglary and was the actual killer. Jackley was granted immunity in exchange for testifying for the prosecution at defendant's preliminary hearing. At trial, the defense called him to testify. Jackley denied killing Tony Stevenson. Defendant attacked Jackley on two basic fronts: (1) Jackley's intimate knowledge of the crime details suggested he may have been the killer; (2) Jackley had been charged with a similar crime several years earlier, but after he testified for the prosecution in that case, charges were dismissed.

A. Jackley's knowledge

Jackley testified he had breakfast with defendant the day of the killing and afterward authorized defendant to leave work. Later in the day, defendant allegedly told Jackley that defendant had entered the Stevenson house and killed Tony Stevenson. Sometime thereafter, Jackley stole the key to defendant's work locker, observed a camera, and handled it with silk gloves so that he would not leave fingerprints on it.

On January 9, 1986, Jackley anonymously called police and implicated defendant in the Stevenson killing. Jackley claimed he called anonymously because he was concerned he might be implicated in the crime for two reasons. First, Jackley had been in the victim's house on at least one social occasion before the killing and was afraid his fingerprints might be found there. (Jackley's wife was acquainted with Dino Stevenson.) Second, Jackley testified he had been charged with a prior murder. Jackley also admitted to having received stolen

goods from defendant, i.e., a ring that defendant had allegedly stolen during a rape and robbery.

Jackley told police that defendant gave the following account of the crime to Jackley: "The way he explained it to me is that while he was in the house, that is, ah, ah, Tony apparently's his name, came in and brought his—brought his dog in? Ya. Called his dog. His dog was with him. Rodney was saying his dog was with him and he thought he was calling some friends or somethin' and then—what the fuck else did he say?—he said right after that took place, Rodney apparently was in one of the bedrooms, he said or somethin', and went behind the corner or somethin' like that .... And the guy [Tony] went into his room. He [defendant] told me he [Tony] came out with a goddamn ah rifle and told him he was gonna beat the shit out of him with it, and he's gonna to do [*sic*] bodily damage.... And he [defendant] said somethin' to the effect that they got into an altercation in the hallway, and that the guy came at him with a rifle, used it like a club—."

Jackley testified to other details of the crime, allegedly told to him by defendant: defendant had "hit" two rooms in the Stevenson house and was in a third when he was interrupted by Tony. Defendant took a .22-caliber revolver from the house and shot Tony in the back with a hollow-point bullet as Tony was running away from the house. Tony fell on the front lawn. Defendant escaped the area "down a brick wall running on the back of" the Stevenson house. He had left his truck idling. He had a conversation with a person outside the house at the end of the wall. (This last reference was apparently to the conversation between Floyd Raney and defendant.)

B. *Jackley's prior crimes*

Jackley, his wife, and two of his acquaintances were arrested in 1974 in connection with a robbery-murder in South Carolina. Jackley admitted he had previously committed a burglary with one of these acquaintances

but denied involvement in the killing. As in the present case, one of the South Carolina defendants allegedly confessed the killing to Jackley, an anonymous call was made to police implicating that defendant, Jackley knew many details of the crime, and he had received stolen goods from those defendants. The South Carolina charges against Jackley, however, were dropped after he testified for the prosecution against his acquaintances.

Jackley admitted to three other burglaries in which (1) he knew the victims, (2) the items taken were similar to those taken from the Stevenson house, and (3) his fingerprints were not found in any of the houses. Based on these similarities to the present crime, defendant argued that one could reasonably conclude Jackley was the killer and the principal burglar in this case.

Penalty Phase Facts

1. *The Prosecution*

The prosecution presented evidence of defendant's three prior burglary convictions—in 1971, 1974, and 1976. The prosecution also presented evidence that defendant raped a female newspaper carrier early one morning in 1985. Defendant forced her to remove her clothing, to fellate him, and to engage in vaginal intercourse. He boasted in vulgar language to a co-worker later that day of having had sexual intercourse with the woman after robbing her.

2. *The Defense*

Members of defendant's family, former neighbors, a psychologist, and a psychiatrist, among others, testified he was subjected for several years to extreme psychological, physical, verbal, and sexual abuse by his stepmother. She often called defendant "a little bastard." She repeatedly beat him with sticks, belt buckles, and brushes and threw him down a flight of stairs with his hands tied. (His father also beat him.) She sometimes

chained him to a basement post for several days, forced him to urinate and defecate in his underpants, and then beat him for that as well. She smeared his feces on his face and held his hands over flames. She once pulled his thumbs from their sockets. She forced him to eat fruit preserves until he vomited.

Dr. Lenore Walker, a licensed psychologist, testified to defendant's recounting of abuse by his stepmother. According to Dr. Walker, the stepmother told defendant she wanted him to look like a girl, she dressed him in her daughter's panties and dresses and made him wash dishes while dressed like a girl. She tied a string around his penis, "... pulling it in back of him so that you couldn't see he had a penis in front of him, and tying the penis to his waist and telling him he looked better that way.... [¶] Then she moved into giving him enemas, using Vaseline and taking a tampon, at first just a clean tampon, and then she would use her own soiled, bloody tampons and insert them in his anus.... [¶] In addition, she would make him insert tampons in her vagina so she was having him touch her as well, and she would make him fondle her vagina area and have him lick her vagina area so she could reach a climax.... [¶] She would also masturbate him at that age—as he got older, some of it is progressing as he got older—between the two-year period of time of 10 and 12, but not allow him to reach an orgasm. When he was a little older and he would reach an orgasm, she would take the semen and smear it all over his face and he would be punished for that. In addition, in order to prevent him from reaching a climax, she would squeeze his testicles, and he remembers that being done with great pain to him. Later on, she would have intercourse with him and insert his penis in her vagina but not allow him to reach an orgasm."

Defendant was eventually taken from his family and lived in foster homes, mental hospitals, a youth authority facility in Nevada, and finally prison.

Dr. Walker further testified that she believed defendant had in fact been sexually molested as he described. She believed that because of his past he suffered a variety of mental maladies, including schizophrenia and disassociation, which in general might best be described as comparable to, but more severe than, post-traumatic stress syndrome. Dr. Walker stated that defendant is very confused, with guilt feelings and a need to be punished, and that his tendency to steal was not motivated by greed, but by a compulsion he could not control. Defendant told her he would often wake up in the middle of a burglary and not know what he was doing there.

John Cahill, a counselor at a Nevada youth camp where defendant had been incarcerated, testified, "Well, I'd say he was picked on by the other boys. He was—he was kind of a pitiful character and tended to be easily manipulated and generally picked on."

Dr. Ernest Noble, a psychiatrist employed by the California Department of Corrections, testified that he had examined defendant in 1971 during one of his incarcerations: "I felt that he had been brought up in a very highly chaotic home environment. And I felt his stepmother was extremely vicious to him.... I felt in some ways that she had set up a template in his head for prison or incarceration very early ...." Dr. Noble also observed that defendant's thumbs appeared to be distorted, thus tending to confirm his description of having had them pulled from their sockets.

Dr. Stephen Wells, a clinical psychologist who examined defendant and reviewed his records, also testified to a lengthy history of abuse: "Given the nature, the prolonged administration and the severity of the mental, the physical, and the sexual abuse, I would say that taken all together, it was almost an impossible group of experiences to recover from. The physical abuse alone, which his stepmother admitted to me when I saw her in Utah itself, was profound and extreme...."

Dr. Wells further testified that defendant suffered severe emotional problems caused by the abuse.

Defendant had two minor children. Defendant's wife testified that he was a loving father. Dr. John Selden, a clinical psychologist, testified he had been treating defendant's five-year-old son for numerous behavioral problems. His son seemed very attached to him. Defendant's family was under great stress from medical and financial problems. Dr. Selden believed defendant was very concerned for his children's welfare.

Discussion

Defendant's primary contention on appeal is that he suffers from severe organic brain damage. Based on that assertion, he raises several arguments against the guilt verdict, the special circumstance finding, and the death sentence. Because the arguments based on alleged brain damage relate to all phases of the trial, we will first address defendant's other challenges directed only to the guilt phase. Second, we shall turn to the special circumstance and penalty phase issues that are not based on the brain damage allegation. Third, we shall resolve defendant's multiple contentions based on the alleged brain damage.

Guilt Phase Issues Other Than Alleged Brain Damage

1. *Juror McCoskey*

On May 26, 1988, shortly before the trial's guilt phase began, Juror McCoskey telephoned the court clerk to say "she was not sure that she could fulfill her duties as a juror ... [t]he nature of the case itself was very upsetting to her...." The clerk noted that McCoskey "had broken down and was crying on the phone." On May 31, the court informed counsel of McCoskey's emotional outburst, recommended that she be excused, and asked counsel to stipulate accordingly. Defense counsel agreed and asked the court to seat an alternate

juror. The prosecutor declined the court's request. The court then questioned McCoskey about her ability to serve as a juror. She had an apparent change of heart, apologized for her emotional phone call, and stated that she believed herself to be able to serve. The court refused to seat an alternate juror. The proceeding was as follows:

"[Court]: Ms. McCoskey, my clerk received the phone call from you which she tells me you were very distraught about possible service on this case?

"[Juror]: I think I was kind of in a state of shock, but I'm all right–.

"[Court]: You no longer feel that you have any kind of disabling factors with regards to sitting on the case? What was it that troubled you?

"[Juror]: I–I think I was in a state of shock that I was on it. You said our possibilities were one in eight, and the seriousness of it, and I think–I think I could be fair.

"[Court]: You do realize–you've gone through the whole thing with us, and the private communication with you without all the other jurors present–that ultimately there may be a problem through serving and sitting in judgment of this defendant. Is that what's bothering you, and is that what caused you concern, the gravity of responsibility as a juror?

"[Juror]: Yes. And I had to–I really had to stop and think about that, but I'm okay–

"[Court]: Is there anything about the communication that we've talked to you privately, now, that you need to add to or any further concern?

"[Juror]: No.

"[Court]: So in a fair sense, if we sit through this case and you believe the person is not guilty, will you have any problem with voting not guilty?

"[Juror]: No.

"[Court]: And I'm talking about the trial we're about to start now?

"[Juror]: Right.

"[Court]: And if it turns out that you're convinced beyond a reasonable doubt that he's guilty from the evidence that you receive, would you have any problems in voting guilty? "[Juror]: No, no problems.

"[Court]: Now once we get into the penalty phase of the trial, if we ever do, you know we're going to hear good things and bad things about the man's life. When we've finished with that you go through that weighing process in the end, if we ever get to that phase of the trial, will you have the ability to come back with a just verdict regardless of what the consequences may be?

"[Juror]: Yes.

"[Court]: So, in other words, if your conscience tells you that the appropriate verdict is life without parole, you can vote that way?

"[Juror]: Yes.

"[Court]: And if your conscience tells you that the death penalty is the appropriate verdict, you think you can vote that way, too?

"[Juror]: Yes.

"[Court]: Is there anything else, now, you need to discuss with the court?

"[Juror]: I'm very sorry, your honor.

"[Court]: Okay. All right. I don't mean to embarrass you, and because we've talked to you privately that shouldn't affect any of your decisions in any regard throughout this case. Okay?

"[Juror]: Okay.

"[Court]: I'm sorry that you became so emotionally charged with the responsibilities.

"[Juror]: I just didn't know if I would be, you know, able to—able to—the different things I heard, you know—not being fair, I know I could be fair.

"[Court]: Is there something at home that's going to be a problem?

"[Juror]: No.

"[Court]: ... All right. Let me give you one last chance, now. If you want off this case, I have a suspicion that the attorneys will stipulate that you be

excused. If you're satisfied that you can do the job, that's another thing. "[Juror]: I feel I can do it."

(1) Defendant contends Juror McCoskey was emotionally unable to fulfill her duties and that the trial court's refusal to dismiss McCoskey violated defendant's federal constitutional rights to due process (U.S. Const., 5th & 14th Amends.), an impartial jury (U.S. Const., 6th Amend.), and a reliable penalty determination (U.S. Const., 8th Amend.). We reject the contentions.

"A juror's inability to perform his or her functions ... must appear in the record as a 'demonstrable reality' and bias may not be presumed." (*People v. Thomas* (1990) 218 Cal.App.3d 1477, 1484 [267 Cal.Rptr. 865], citing *People v. Collins* (1976) 17 Cal.3d 687, 696 [131 Cal.Rptr. 782, 552 P.2d 742]; *People v. Compton* (1971) 6 Cal.3d 55, 60 [98 Cal.Rptr. 217, 490 P.2d 537].) The record reflects no demonstrable reality that McCoskey was unable to serve as a juror. Moreover, under Penal Code section 1089, which allows a trial court to remove a juror on a finding of good cause, "The determination of 'good cause' in this context is one calling for the exercise of the court's discretion; and if there is any substantial evidence supporting that decision, it will be upheld on appeal." (*People v. Thomas*, *supra*, 218 Cal.App.3d at p. 1484.) Substantial evidence supports the trial court's determination that McCoskey could fulfill her duty. In response to careful questioning by the court, she made clear her belief that she could be impartial and able to serve despite her prior misgivings. In that circumstance, the trial court was within its discretion not to remove her from the jury. (*People v. Goldberg* (1984) 161 Cal.App.3d 170, 192 [207 Cal.Rptr. 431] [no good cause to discharge juror who ultimately recanted her initially claimed inability to judge impartially]; *People v. Franklin* (1976) 56 Cal.App.3d 18, 25-26 [128 Cal.Rptr. 94] [same].)

2. *Alleged Failure to Investigate and Preserve Evidence*

(2a),(3a) Defendant contends the prosecution violated his right of due process by failing to preserve (or, as he puts it, by destroying) two critical pieces of exculpatory evidence. First, he asserts the victim's autopsy was inadequate because discolorations on the victim's hands were not excised and examined. Second, defendant contends the prosecution destroyed material exculpatory evidence by test-firing the rifle found at the crime scene.

As defendant acknowledges, trial counsel failed to object to the alleged shortcomings in the autopsy or the rifle testing. The objections are thus waived and cannot be raised on direct appeal. (Evid. Code, § 353; *People v. Gallego* (1990) 52 Cal.3d 115, 179-180 [276 Cal.Rptr. 679, 802 P.2d 169]; *People v. Coleman* (1988) 46 Cal.3d 749, 777-778 [251 Cal.Rptr. 83, 759 P.2d 1260].)

(4) We also reject these contentions on the merits. The federal constitutional guarantee of due process imposes a duty on the state to preserve only such "... evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, see *United States v. Agurs* [(1976)], 427 U.S. [97], at 109-110 [49 L.Ed.2d 342, 353-354, 96 S.Ct. 2392], evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*California v. Trombetta* (1984) 467 U.S. 479, 488-489 [81 L.Ed.2d 413, 422, 104 S.Ct. 2528], fn. omitted (*Trombetta*); *People v. Webb* (1993) 6 Cal.4th 494, 519-520 [24 Cal.Rptr.2d 779, 862 P.2d 779]; *People v. Johnson* (1989) 47 Cal.3d 1194, 1233 [255 Cal.Rptr. 569, 767 P.2d 1047].) The state's responsibility is further limited when, as in the present case, the defendant's challenge is to "... the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." (*Arizona v.*

Youngblood (1988) 488 U.S. 51, 57 [102 L.Ed.2d 281, 289, 109 S.Ct. 333].) In this circumstance, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." (*Id.*, at p. 58 [102 L.Ed.2d at p. 289].) "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." (*Id.*, at p. 57, fn. * [102 L.Ed.2d at p. 288].) Applying these principles to the two items in question, we find no constitutionally improper conduct by the police because the items had no then-apparent exculpatory value.

A. *Discolorations on the victim's hands*

(2b) Autopsy photographs showed discolorations on the victim's hands. The prosecution's pathologist testified on cross-examination that he could not determine whether these discolorations were bruises or whether they occurred close to the time of death because the discolored areas had not been excised from the victim's body and examined microscopically. Defendant contends this failure to examine the discolorations undermined his ability to substantiate his claim that the victim was shot in the heat of a struggle and that the killing was not intentional. He asserts the crime scene evidence, for example, the shattered rifle in the hallway, indicated a struggle and that bruises on the victim's hands would have been the "physical evidence necessary to link him [the victim] to that struggle." Even with the benefit of hindsight, we are not persuaded the evidence would have had any meaningful exculpatory value. If an examination had revealed the victim's hands were bruised during the burglary, such evidence would not point necessarily to the conclusion he had struggled with defendant. Moreover, even that conclusion would have aided defendant only minimally, if at all. That the victim was struggling to protect

himself or his home does not by itself negate the finding that he was intentionally killed. One could just as reasonably conclude to the contrary—that he was killed *because* he was struggling. The lack of exculpatory value is also demonstrated by defense counsel's argument to the jury. Emphasizing various aspects of the crime scene evidence in detail, counsel argued that the killing was not intentional. Counsel did not refer, however, to the discolorations on the victim's hands and did not suggest the victim had been bruised during the alleged struggle. Even if viewed in the light most favorable to defendant, the best that can be said is that the evidence of bruising might have had some minimal exculpatory value. That is not enough. The constitutional duty to preserve evidence is "limited to evidence that might be expected to play a *significant* role in the suspect's defense." (*Trombetta*, *supra*, 467 U.S. 479, 488 [81 L.Ed.2d 413, 422], italics added, fn. omitted.) We find to be farfetched the notion that a jury would find anything significantly exculpatory in the fact, if it was a fact, that a resident was shot while struggling to defend himself and his home from a burglar. We therefore cannot conclude that the police were aware during their investigation of any exculpatory value in possible bruises on the victim's hands.

B. *Test-firing of the rifle*

(3b) Defendant contends a test-firing of the rifle found in the victim's house destroyed material exculpatory evidence by precluding a determination whether the rifle had been fired by the victim on the day of the killing. We reject this contention for several reasons, including defendant's failure to establish as a factual predicate that the testing he seeks was not done. Stanley Slonina, employed as a firearms specialist in the Orange County Sheriff's crime laboratory, testified he recovered and examined the rifle at the crime scene on the day of the killing. Defense counsel did not ask Slonina on cross-examination if he checked the

temperature of the rifle, smelled gunpowder, or conducted any other field examination to determine if the rifle had been recently fired. Even if we assume, however, that no such determination was made, defendant also fails to show the test-firing precluded the further testing he claims should or could have been done. Perhaps most obvious by omission is defendant's failure to establish the existence of any subsequent laboratory test that would have shown whether the rifle was fired on the day of the killing. Defendant cannot fairly charge the prosecution with precluding testing that may not have been possible. Moreover, even if we assume to be true defendant's factual premise that the test-firing precluded further testing and that such testing would have shown the rifle was fired the day of the killing, defendant has failed to show the testing would have had any exculpatory value that would have reasonably been apparent to the police. (See, e.g., *People v. Webb*, *supra*, 6 Cal.4th 494, 518-520 [rejecting the defendant's contention that police should have preserved a revolver].) Evidence the rifle was fired the day of the killing would not have established it was fired by the victim—the key to defendant's claim. Moreover, we find most attenuated the notion that defendant could establish a lack of intent by showing a struggle based on the fact that the victim might have fired the rifle. As with the claim regarding the discolorations on the victim's hands, the victim's struggle to protect himself or his home does not itself negate the finding he was intentionally killed. Evidence that the rifle was fired the day of the killing would not have played "a *significant* role in the suspect's defense." (*Trombetta*, *supra*, 467 U.S. 479, 488 [81 L.Ed.2d 413, 422], italics added, fn. omitted.)

3. *Admission of Autopsy Report*

(5a) Dr. George Bolduc, the pathologist who conducted the autopsy on the victim, did not testify. The prosecution instead called a pathologist who did not

participate in the autopsy to testify regarding the autopsy report, which, despite defendant's objection, was admitted into evidence under Evidence Code section 1271, the business records exception to the hearsay rule. Defendant contends admission of the report was error for several reasons: (1) the prosecution failed to establish the autopsy report's trustworthiness; (2) Dr. Bolduc was not unavailable and should have been required to testify; (3) admission of the report into evidence without an opportunity for defendant to cross-examine Dr. Bolduc violated defendant's constitutional right of confrontation; and (4) the report contained inadmissible medical opinion. We conclude the report was properly admitted into evidence.

A. *Trustworthiness*

Evidence Code section 1271 states that a document is admissible as a business record only if "[t]he sources of information and method and time of preparation were such as to indicate its trustworthiness." (Evid. Code, § 1271, subd. (d).) **(6)** The proponent of the evidence has the burden of establishing trustworthiness. (*People v. Diaz* (1992) 3 Cal.4th 495, 534-535 [11 Cal.Rptr.2d 353, 834 P.2d 1171]; 3 Witkin, Cal. Evidence (3d ed. 1986) Introduction of Evidence at Trial, § 1726, p. 1681.) The trial court, however, has "... wide discretion in determining whether sufficient foundation is laid to qualify evidence as a business record. On appeal, exercise of that discretion can be overturned only upon a clear showing of abuse." (*People v. Lugashi* (1988) 205 Cal.App.3d 632, 638-639 [252 Cal.Rptr. 434].)

(5b) We find no abuse of discretion in this case. Dr. Fukumoto, a pathologist who had worked in the same office as Dr. Bolduc, testified, albeit over defendant's confrontation-clause objection, regarding the autopsy procedures of the office and further testified that standard operating procedures were followed in the Stevenson autopsy and in the documentation of the

autopsy. Moreover, the trial court was aware that Dr. Bolduc had apparently left the coroner's office under unfavorable conditions. Before the report was admitted into evidence, the testifying pathologist acknowledged on cross-examination that Dr. Bolduc had caused "quite a bit of consternation" in a prior murder case by basing his conclusion regarding the cause of death on a police report rather than on medical evidence. By admitting the report into evidence, the court impliedly found the report to be trustworthy nevertheless. The terms under which Dr. Bolduc departed the coroner's office and his asserted misconduct in a prior, unrelated case were facts for the trial court to consider—and, indeed, might even raise questions—but they did not mandate a finding that the autopsy report in this case was untrustworthy.

B. *Dr. Bolduc's unavailability*

Defendant contends admission of the report was error because it "was premised on the puzzling conclusion that Dr. Bolduc was unavailable." Defendant does not clearly explain the point of this assertion, but he seems to contend that because the report was not sufficiently trustworthy to be admitted under Evidence Code section 1271 his constitutional right of confrontation entitled him to cross-examine Dr. Bolduc regarding the report. (Evidence Code section 1271 itself states no requirement that the person who prepared the business record testify regarding its contents.) We rejected a similar contention in *People v. Clark* (1992) 3 Cal.4th 41, 158 [10 Cal.Rptr.2d 554, 833 P.2d 561], in which the physician who conducted an autopsy and prepared the report died before being called to testify about his report. A different physician was permitted, as in the present case, to testify about the report over the defendant's objection. We explained that the report was properly admitted into evidence as an official record under Evidence Code section 1280. Thus, "The contents of Dr. Carpenter's [the examining physician's] report were admitted under a 'firmly rooted' exception to the

hearsay rule that carries sufficient indicia of reliability to satisfy the requirements of the confrontation clause." (3 Cal.4th at p. 159; see also *People v. Demes* (1963) 220 Cal.App.2d 423, 442 [33 Cal.Rptr. 896] [no error in allowing physician other than the examining coroner to testify regarding autopsy report]; *People v. Wardlow* (1981) 118 Cal.App.3d 375, 388 [173 Cal.Rptr. 500] [same].)

The same principle obtains in the present case even though the report was admitted under Evidence Code section 1271, the business records exception to the hearsay rule, rather than under Evidence Code section 1280, the official records exception. "[T]he cases require the same showing of trustworthiness in regard to an official record as is required under the business records exception.... Section 1280 constitutes the law declared in these cases by explicitly requiring the same showing of trustworthiness that is required in Section 1271." (Cal. Law Revision Com. com., Deering's Ann. Evid. Code (1965 ed.) § 1280, p. 438 [citations omitted].) In light of our conclusion that the trial court was within its discretion in finding Dr. Bolduc's report sufficiently reliable to be admitted under Evidence Code section 1271, defendant's right of confrontation was not violated.

C. *Medical opinion*

Defendant briefly asserts the autopsy report was inadmissible because it contained Dr. Bolduc's medical opinions, for example, the cause of the victim's death. We disagree for several reasons. First, defendant did not raise this objection at trial. Rather, he objected to admission of the autopsy report on the ground it was not subject to the business record exception under Evidence Code section 1271. The present objection, i.e., that the report contained Dr. Bolduc's opinions, is therefore waived.

Second, defendant even now does not specify the opinions to which he objects except Dr. Bolduc's

opinion regarding the cause of death. We decline to address an objection to unspecified opinions.

Third, Dr. Bolduc's conclusion regarding the cause of death was not inadmissible opinion. (7) To be sure, some medical opinion has been deemed inadmissible under the business records exception of Evidence Code section 1271. (*People v. Reyes* (1974) 12 Cal.3d 486, 502-503 [116 Cal.Rptr. 217, 526 P.2d 225] [psychiatric opinion not admissible]; *People v. Terrell* (1955) 138 Cal.App.2d 35, 57 [291 P.2d 155] [physician's opinion that patient had criminal abortion not admissible].) The reasoning in those cases was that, to be admissible under the business records exception, the evidence "... must be a record of an act, condition, or event; a conclusion is neither an act, condition or event; it may or may not be based upon conditions, acts or events observed by the person drawing the conclusion...." (138 Cal.App.2d at p. 57.) As the *Terrell* court explained, however, "It is true that some diagnoses are a statement of a fact or a condition, for example, a diagnosis that a man has suffered a compound fracture of the femur is a record of what the person making the diagnosis has seen but this is not true where the diagnosis is but the reasoning of the person making it arrived at from the consideration of many different factors." (138 Cal.App.2d at p. 58; *People v. Reyes*, *supra*, 12 Cal.3d 486, 503 [holding inadmissible a subjective psychiatric opinion and noting the distinction made in *Terrell*, *supra*, 138 Cal.App.2d 35, 57].) (5c) The same reasoning obtains in the present case. Dr. Bolduc's conclusion regarding the cause of death—a bullet wound to the heart—was based on his direct observation and is no different in kind from a diagnosis of a broken femur, the example noted in *Terrell* of an observed fact. Indeed, all of Dr. Bolduc's relevant conclusions are of this type. He concluded in his report that: (1) "There is an entrance gunshot wound of the posterior left chest [i.e., the back]...." (2) "This is a distant gunshot wound entrance.... The wound is free of gunpowder, burns or

stippling." (3) The shot pierced the heart. (4) "The direction of the [bullet] track is forwards, up 45 degrees and left to right 10 degrees." None of these conclusions, including that regarding the cause of death, was inadmissible under Evidence Code section 1271.

Fourth, even assuming, solely for discussion, that Dr. Bolduc's conclusion regarding the cause of death—the only opinion to which defendant specifically objects—was inadmissible opinion, it was harmless. We note *People v. Williams* (1959) 174 Cal.App.2d 364 [345 P.2d 47], a murder case in which, as in the present case, a physician testified regarding the contents of an autopsy conducted by another physician. The court observed, "[T]he sole and only purpose served by the records in the trial was to establish the cause of death. Appellant certainly was not prejudiced by this testimony because neither at trial nor here, does he seriously challenge the fact that the life of the deceased was terminated by a gunshot wound." (*Id.*, at p. 391.) Likewise here, Dr. Bolduc's conclusion that the victim died from a gunshot wound to the heart is not disputed. Nor does defendant dispute Dr. Bolduc's conclusion that the victim was shot in the back. Similarly, criminalist Richard Brown testfied independently of the autopsy report that the distance from the gun muzzle to the victim was at least two feet. Admission of these conclusions was not prejudicial to defendant.

Special Circumstance Issues Other Than Alleged Brain Damage

Defendant contends the special circumstance finding of murder in the commission of a burglary (Per. Code, § 190.2, subd. (a)(17)(vii)) must be set aside for three reasons: (1) improper instructions, (2) insufficient evidence, and (3) his alleged brain damage. We at this point address the instructions and evidence but will later discuss the brain damage contention in connection with the other issues related to that allegation. Before proceeding, we note this case is subject to the holding of

Carlos v. Superior Court (1983) 35 Cal.3d 131, 153-154 [197 Cal.Rptr. 79, 672 P.2d 862] (*Carlos*), that a felony-murder special circumstance required proof of the defendant's intent to kill. We later overruled *Carlos* by holding that intent to kill must be charged and proved only where the defendant was an aider and abettor to the homicide and not the actual killer. (*People v. Anderson* (1987) 43 Cal.3d 1104, 1138-1147 [240 Cal.Rptr. 585, 742 P.2d 1306].) We subsequently held, however, that for crimes committed during the period between *Carlos* and *Anderson*, the *Carlos* requirement of an intent to kill would govern. (*People v. Fierro* (1991) 1 Cal.4th 173, 227 [3 Cal.Rptr.2d 426, 821 P.2d 1302].) The killing in this case was during that period.

1. *Instructions on Special Circumstance*

(8a) A finding of implied malice is not sufficient to establish the intent-to-kill requirement of *Carlos*, *supra*, 35 Cal.3d 131. (*People v. Ramos* (1984) 37 Cal.3d 136, 148, fn. 3 [207 Cal.Rptr. 800, 689 P.2d 430].) Defendant contends the trial court incorrectly "left the impression that implied malice was sufficient to establish the requisite intent to kill." We are not persuaded.

The trial court instructed the jury with respect to the special circumstance as follows: "To find that the special circumstance, referred to in these instructions as murder in the commission of a burglary is true, it must be proved ... that the defendant *intended to kill* a human being or intended to aid another in the killing of a human being.... [¶] The only evidence of whether defendant *specifically intended to kill* Mr. Stevenson is circumstantial evidence. You may only find that the special circumstance alleged is true if the proved circumstances are not only consistent with the theory that Mr. Beeler had *the specific intent to kill* Mr. Stevenson, but cannot be reconciled with any other rational conclusion. [¶] Also, if the evidence as to whether defendant had the required *specific intent to kill*

Mr. Stevenson is susceptible of two reasonable interpretations, one of which ... points to the existence of *specific intent* and the other of which points to the absence of *specific intent*, it is your duty to adopt that interpretation which points to the absence of *specific intent.*" (Italics added.)

Defendant contends this instruction was insufficient in two respects. Before turning to the merits of those contentions, we note his acknowledgment that "... defense counsel did not object to the intent to kill instruction in the lower court." Defendant contends this failure to object does not constitute a waiver because under Penal Code section 1259, "The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." As we shall explain below, we find no merit to defendant's objections to the instructions. We therefore need not decide the procedural question of whether those objections were properly preserved under Penal Code section 1259. We note, however, that what defendant appears to be asserting is that the trial court should have explained the special circumstance instruction. (9) In the absence of a request, however, a trial court is under no obligation to amplify or explain an instruction. (*People v. Bonin* (1989) 47 Cal.3d 808, 856 [254 Cal.Rptr. 298, 765 P.2d 460]; *People v. Anderson* (1966) 64 Cal.2d 633, 639 [51 Cal.Rptr. 238, 414 P.2d 366].) We shall nevertheless address the merits of defendant's contentions.

(8b) He first contends, barely in passing, "The court failed to explain that 'intent to kill' means the intent to take the life of a human being." This contention is belied by the record. As stated above, the special circumstance instruction included the explicit requirement that "the defendant intended to kill a human being...."

Defendant more vigorously contends the trial court failed to instruct the jury that implied malice was not

sufficient to establish a specific intent to kill and that the error failed to channel the jury's discretion, thus violating the Eighth Amendment to the federal Constitution. He points to the trial court's earlier instruction regarding the murder charge that, "When it is shown that a killing resulted from the intentional doing of an act with implied malice, no other mental state need be shown to establish the mental state of malice aforethought." Defendant contends the absence of an instruction that intent to kill requires more than a finding of implied malice may have caused the jury reasonably to conclude "that implied malice was sufficient to establish the specific intent to kill." We reject the contention. The special circumstance instruction did not refer to a killing with *malice* and thus would not have caused the jury to refer to the definition of malice as now suggested by defendant. Moreover, the special circumstance instruction repeatedly and explicitly referred to a "specific intent to kill." The earlier instructions regarding malice stated, " 'Malice' is express when there is manifested an intention unlawfully to kill a human being. [¶] 'Malice' is implied when the killing results from an unjustified intentional act, the natural consequences of which are dangerous to life, where it is shown that the defendant consciously disregarded the high degree of probability that the act would result in death." The language of the implied malice definition is simply not consistent with the notion of a specific intent to kill. Thus, even if the jury did refer to the definition of malice, nothing in that definition would have suggested that implied malice was congruent with a specific intent to kill. Moreover, the prosecutor's closing argument foreclosed any realistic possibility of the jury not believing they had to find intent to kill for the special circumstance. "The defendant intended to kill the human being. Now, that is the difference between felony-murder and special circumstance." Describing a chart shown to the jury, he further explained, "As you can see, first of all, on the chart here

with the counts and the crimes, I have 'felony-murder' in red down where 'special circumstance' is, I also have it in red up where 'murder' is, but under 'special circumstance' I have 'intent to kill' with that, and that is supposed to show the distinction between the two. [¶] You can find the defendant guilty of felony-murder in the first degree and conceivably, not even looking at these facts here, but conceivably find the defendant not, or the special circumstance not true, even though it's felony-murder related, because of the intent to kill; that [i.e., intent] is needed."

We reject defendant's contention the jury was perhaps misled by the instructions into finding the felony-murder special circumstance to be true based only on a showing of implied malice.

2. *Evidence of Specific Intent to Kill*

(10) Defendant contends the special circumstance is not supported by substantial evidence and thus violates the California and federal constitutional due process guaranties. He agrees, however, with respondent that the general standard of review of this factual question is whether "'... after viewing all the evidence in the light most favorable to the prosecution' any rational trier of fact could have found the elements of the crime beyond a reasonable doubt." (*People v. Edwards* (1991) 54 Cal.3d 787, 813 [1 Cal.Rptr.2d 696, 819 P.2d 436].) Respondent asserts three reasons why the finding of a specific intent to kill is supported.

(1) Respondent contends defendant fired *two shots from a single-action revolver while standing inside the house.*—Defendant asserts the evidence does not show that both shots were fired from the revolver or that they were fired from inside the house. One bullet was retrieved from the victim's body; the other bullet was found lodged in a parked car across the street from his house. The bullet recovered from Tony's body was not fired from Tony's .22-caliber rifle but *could* have been fired from a .22-caliber single-action Ruger revolver

similar to the one taken from Michael's bedroom. Thus, respondent is correct that the evidence supports an inference at least one shot was fired from the revolver. The bullet in the car, however, was extensively damaged by impact, and the only conclusion that could be drawn from laboratory testing was that the bullet was consistent with a .22-caliber long-rifle projectile. That bullet could have been fired from either Michael's revolver or Tony's rifle. Defendant is therefore correct that respondent overstates the evidence by asserting it establishes that two shots were fired from the revolver. Respondent is likewise too expansive in asserting that the evidence establishes the two shots were fired from inside the house. There was only a single bullet hole in the front screen door.

Although the evidence does not mandate the inferences on which respondent relies, it does permit those inferences. The fact there was only one bullet hole in the screen door does not necesarily refute the inference that both shots were fired from inside the house. One of the shots could have been fired while the door was open or while the shooter was perhaps standing in the doorway. Trajectory testing showed that "It was consistent for someone to have fired a weapon inside the residence, have a clear line of fire and hit the car out in front of the residence." This clearly permits the inference that at least one shot was fired from inside the residence. Moreover, in connection with the same test, police found in the front lawn an indentation directly underneath the string used to measure the trajectory, "a rounded portion where it appeared something had fallen down, possibly a knee, right into the lawn underneath the string. And then right next to the indentation, the rounded portion, there was a disturbance where the grass had actually been pulled up." The lawn indentation permitted the inference the victim was shot and fell in the line of trajectory from the house to the car. This, in turn, would support the inference that both shots were fired from the same

location, i.e., from inside the house. Moreover, the bullet retrieved from the victim's body could have been fired from the revolver, and the bullet from the car was the same type of projectile as the bullet retrieved from the victim's body. The foregoing evidence taken as a whole clearly permits the inferences that two shots were fired from the revolver and that they were both fired from inside the house. Most important, the dispute over how many shots were fired from which weapon and from what location is largely beside the point. At a bare minimum, the record supports inferences that defendant fired two shots, one of which struck the victim in the back.

(2) Respondent contends the victim was shot in the back *while fleeing from defendant,* who was in the act of burglarizing the victim's home.—Defendant contends there is no credible evidence of where the victim was when he was shot. Defendant points to testimony by the prosecution's pathologist that he could not state "the exact position the gun was in when the gun was fired or the exact position the deceased was in when the gun was fired." Defendant seems to suggest that the victim may have been shot inside the house rather than outside on the lawn and that, if he was shot inside, that fact would support the theory of a struggle with defendant, which might negate specific intent. The evidence at least equally, however, also supports the inference sought by the prosecution. Defendant's contention is also beside the point. The evidence showed the victim was shot in the back from a distance of at least two feet. This plainly supports an inference that he was shot while fleeing.

(3) Respondent contends the fatal shot *pierced the victim's heart.*—To be sure, the precise location of the internal wound does not by itself necessarily establish that defendant aimed for the victim's heart or that he intended to kill, but this evidence does at least permit that inference. That is sufficient. Moreover, the far more persuasive fact is that the victim was shot in the

back in the area of the heart. Evidence the bullet pierced the heart added little to the prosecution's case.

In short, differing inferences could have been drawn from the evidence, and the jury might have found the special circumstance not to be true, perhaps based on defendant's suggestion there was a struggle or on some other theory. But that is not the point. If the evidence reasonably justifies the finding of the jury, the reviewing court's opinion that the evidence could also be reconciled with some contrary view does not warrant a reversal of the finding. (*Jackson v. Virginia* (1979) 443 U.S. 307, 316-320 [61 L.Ed.2d 560, 571-574, 99 S.Ct. 2781].) We hold the special circumstance finding is amply supported by substantial evidence.

Penalty Phase Issues Other Than Alleged Brain Damage

1. *Death of Juror Coley's Father*

Defendant contends the penalty verdict was coerced because the trial court improperly required a juror to continue deliberating despite his father's death. On Tuesday, July 12, 1988, after two days of penalty deliberations, one of the jurors, Michael Coley, informed the court by telephone that the juror's father had died. The following proceeding took place later that morning in the judge's chambers outside the presence of counsel for both sides:

"The Court: Juror Coley called in this morning, indicated there was a death in his family. Other than that, no other formal message other than he expected to fly out of state at two o'clock in the afternoon today. I asked the clerk to get hold of him and find out the particulars of it. Court called both counsel. Neither have honored their 20-minute call. They've gone to Westminster Court. The court has been able to contact one of the parties, I believe, and they were beyond an hour limit. The court is going to cause the jury to begin deliberations again. I'm simply making a record of the

information I've received from this juror, and that is that the family member that is deceased is his father, they have a close relationship, he needs to be there, and he will be back—Monday?

"Juror Coley: Monday.

"The Court: The court's going to cause the jury to begin deliberations again and we'll recess early for the convenience of this juror, sometime before noon. And after I speak to the attorneys, the probability is that I will not excuse this juror and will not place an alternate in his seat and will expect that we will begin deliberations again on Monday. So even if the attorneys do not show, that is the information that Mr. Coley will have and he will be required to come back on Monday, unless there's some other severe family problem that you notify us of by phone. Okay?

"Juror Coley: Okay."

Shortly thereafter, about 10:20 a.m., all counsel arrived, and the court provided them with a transcript of the earlier conference between the court and Juror Coley. Defense counsel expressed concern: "Mr. Barnett: I ask the court to seat the alternate juror. I'm afraid that by terminating deliberations sometime before noon the jury may feel some sense of urgency in reaching a verdict today. Or if they don't reach a verdict today, that if they have to come back next week that's going to put them beyond our estimate and they may feel forced to reach a verdict." The estimate to which counsel referred was the court's earlier representation during jury selection that "It's possible that we could go a couple of weeks into July and the outermost probability is that the middle of July would terminate the responsibility of the juries [*sic*] on the case." The Monday on which the court proposed to resume deliberations would have been July 18.

Defense counsel and the prosecutor then explained they had arrived a few minutes late for the meeting with Juror Coley because they had been together in another courthouse. The court responded: "Excellent. I'm not

angry at you folks.... Had the court known that, I wouldn't have talked to the juror privately." Defense counsel then explained his concern that the juror might draw a negative inference from the court's comment to the juror that counsel had not appeared in response to the court's call. The court agreed: "You're probably right. What would you ask the court to do?"

Counsel requested that the juror be excused, explaining that his primary concern was not the prior reference to counsel's absence, but the effect of allowing Juror Coley to continue deliberations: "Mr. Barnett: The problem is, your honor, that the court gave him no instructions as to, I suppose—that's how to deal with the other jurors with respect to his present problem. In other words, we don't know what he's told them; that he's informally told them, hey, we're gonna be off, or I have to catch a ... plane at 2:00, or I have to come back next week if we don't reach a verdict this morning. What time was the court planning on excusing the jury today?

"The Court: In 20 minutes.

"Mr. Barnett: One additional point or argument for the excusal of Mr. Coley, is that there's no way to predict the impact of the death of a family member, no way for counsel, the court, or the juror himself, the effect that may have on him in the penalty phase of a death case."

The court stated it would reconvene the jury in open court at 11 a.m. to clear up any misimpression about why counsel had not been present earlier. Before that time, however, the jury returned a verdict. Defendant reiterated his objection that the verdict had been coerced. The court overruled the objection, stating "I don't believe there's any factor of coercion." The court then queried the jury:

"The Court: Prior to the court inquiring about the verdict, the court is aware that juror number eight, Mr. Coley, had a death in his family and that he was going to have to leave the area at two o'clock this afternoon.

Did any of the jurors feel the pressure of that incident in arriving at your verdict? Directed at Mr. Wilcox the foreman.

"Jury Foreman: No, I don't believe so, your honor.

"The Court: If any juror now feels that they need additional time to discuss the case or reconsider the verdict because of the pressure of time, I'll hear from any juror. Any juror that has a feeling like that, please raise your hand. Did the fact that Mr. Coley was going to be excused and there was a probability that we would begin the case anew on Monday the 18th, have anything to do with the verdict that you've reached, Mr. Wilcox?

"Jury Foreman: No, Sir.

"The Court: Do any of you feel in any way differently than that, that there might be some impropriety in the verdict because of the press of time? If so, please raise your hand."

(11a) Defendant contends the trial court's handling of this matter constituted error in two respects. His primary contention is that Juror Coley should not have been allowed to deliberate further that day and that the penalty verdict was coerced under the circumstances. He also asserts the trial court "committed constitutional error in engaging in a private conversation with a juror outside the presence of Beeler or his counsel." There was no error.

(12) A trial court's decision whether to discharge a juror for good cause under Penal Code section 1089 is subject to review under the abuse-of-discretion standard. (*People v. Ashmus* (1991) 54 Cal.3d 932, 986-987 [2 Cal.Rptr.2d 112, 820 P.2d 214] (*Ashmus*); *In re Mendes* (1979) 23 Cal.3d 847, 852 [153 Cal.Rptr. 831, 592 P.2d 318] (*Mendes*).) **(11b)** Nothing in the record shows an abuse of discretion in this case. To the contrary, the court accommodated Juror Coley to the fullest extent by offering to recess the trial and to truncate deliberations on the day in question so that he could leave town. Likewise, the trial court was in the best position to observe the juror's demeanor. Nothing in the record

indicates there was any communication between the court and Coley that was not included in the record but which might have cast doubt on Juror Coley's ability to proceed. Penal Code section 190.9 requires that all proceedings in a capital case must be conducted on the record with a court reporter present. "It is presumed that official duty has been regularly performed." (Evid. Code, § 664.) The presumption obtains in this case.

We do not suggest that a more detailed inquiry by the court would have served no purpose. For example, if Juror Coley had been questioned regarding his state of mind or if he had stated affirmatively on the record his ability and willingness, or lack thereof, to proceed, such information would assist us in determining whether the trial court abused its discretion in allowing Coley to continue deliberating. Although such inquiry is preferred, it is not required. As we explained in *Ashmus*, *supra*, 54 Cal.3d 932, 987, a hearing is not required in all circumstances. The court's discretion in deciding whether to discharge a juror encompasses the discretion to decide what specific procedures to employ including whether to conduct a hearing or detailed inquiry. (Accord, *Mendes*, *supra*, 23 Cal.3d 847, 852.)

Moreover, the record supports no inference that Juror Coley was coerced. He did not request to be discharged. Neither did he object to the trial court's decision to allow deliberations to continue briefly. To accept defendant's claim of jury coercion, we would have to assume without any evidence in the record that Juror Coley was so distracted by his father's death that he felt compelled to return a speedy verdict or that other jurors were aware of the situation and were somehow affected by it. We may not properly make such assumptions. The inability to perform the functions of a juror "'... must appear in the record as a demonstrable reality ....'" (*Mendes*, *supra*, 23 Cal.3d 847, 852, quoting *People v. Compton* (1971) 6 Cal.3d 55, 60 [98 Cal.Rptr. 217, 490 P.2d 537].) Nothing in the record shows a "demonstrable reality" that Juror Coley was

unable to discharge his duties or that he felt coerced to return a verdict. We reiterate that the record does not indicate a request by Juror Coley to be discharged or even to be accommodated by not having to deliberate that day. Moreover, Juror Coley already had reserved a flight when he informed the court of his father's death. The court made clear that Juror Coley would be allowed to leave sufficiently early that day to travel to the airport for his flight. Coley agreed to the court's proposal. Nothing in the record suggests that Coley asked for additional time, disagreed with the court's proposal, or was subjected to any time pressure. Similarly, the record does not indicate that any other juror was affected by the circumstances.

We have not previously had the same situation before us, i.e., a case in which a juror continued deliberating after a family death, but we have dealt with the converse, i.e., a juror who was discharged because of a family death. In *Mendes*, *supra*, 23 Cal.3d 847, the defendant objected to the trial court's having excused without a hearing a juror who requested to be excused because his brother had died the previous night. In a later capital case, the trial court summarily discharged during penalty deliberations a juror whose mother had died the preceding night. (*Ashmus*, *supra*, 54 Cal.3d 932, 986-987.) We upheld the discharge in both cases, but those results do not support defendant's claim of coercion in this case. In both those cases, the jurors requested discharge from the jury. The issue in both was whether the trial court abused its discretion in granting the juror's request, We held in both cases that a hearing to determine good cause for the discharge was not required because good cause was so clearly established under the circumstances. By contrast, Juror Coley did not request to be discharged or even that deliberations not resume the day he informed the court of his father's death.

Apparently, defendant would have us assume as a matter of law that the death of a juror's parent is so

debilitating that the juror is presumptively unable to deliberate. Perhaps some jurors would be thusly affected. We do not gainsay the intuitive conclusion that a person is likely saddened by the death of his or her parent. Indeed, we have recognized that a family death can be difficult for a juror. (*Mendes*, *supra*, 23 Cal.3d 847, 852; *Ashmus*, *supra*, 54 Cal.3d 932, 987.) That recognition does not mean that every juror is equally affected or that such difficulty, even when it arises, necessarily renders the juror unable to perform his or her duties.

(13) We need only briefly note defendant's secondary contention that the trial court erred by engaging in an ex parte communication with Juror Coley. (This contention seems directed to the fact of the communication rather than to its substance. To the extent defendant objects to the substance of the communication, that objection relates to the alleged coercion of Juror Coley. We have rejected that contention as explained above.) If, as defendant contends, albeit without any support in the record, Coley was distressed and had a pressing need to arrange his affairs, the situation might have been exacerbated if the court had refused even to speak with him until counsel arrived at the court. It is simply not error for a trial court to engage in a brief, administrative communication when informed of a death in a juror's family. Reality and common sense dictate that a court be allowed to learn what has happened. (See, e.g., *Ashmus*, *supra*, 54 Cal.3d 932, 986-987; *Mendes*, *supra*, 23 Cal.3d 847, 852.) Of course, a court at some point might err by going beyond what is administratively necessary, but that point was not reached in this case.

2. *Effect of Death Penalty on Defendant's Family*

(14) Defendant contends the trial court erred by refusing to allow defendant's counsel to examine Robert Lippold on the effect of a death penalty on defendant's family. Lippold was a licensed clinical psychologist. (He

performed a psychological evaluation of defendant's mother in 1964 for the juvenile court in Salt Lake City, Utah, and he testified in the present action regarding that evaluation. That portion of his testimony is not relevant to this issue.) Lippold later worked in the State of Nevada prison system for nine years as a psychologist, superintendent of a women's prison, and warden of a maximum security prison. He testified he had the opportunity during this period to interview the families of people on death row.

We have not previously decided explicitly whether evidence of the effect of a death penalty on the defendant's family is "constitutionally pertinent mitigation" evidence. (*People v. Cooper* (1991) 53 Cal.3d 771, 844, fn. 14 [281 Cal.Rptr. 90, 809 P.2d 865]; *People v. Fierro*, *supra*, 1 Cal.4th 173, 241; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 143 [2 Cal.Rptr.2d 335, 820 P.2d 559].) Again, we need not decide this because, even if such evidence might otherwise be admissible, Lippold's proposed testimony was not admissible because he had no personal knowledge of defendant's family. The most that Lippold could have stated would have been his opinion regarding the effect on those families of whom he did have personal knowledge. This would have been an opinion regarding the death penalty in general. Such an opinion would not be relevant to the proper inquiry, which is to tailor the defendant's punishment "to his *personal* responsibility and moral guilt." (*Enmund v. Florida* (1982) 458 U.S. 782, 801 [73 L.Ed.2d 1140, 1154, 102 S.Ct. 3368], italics added.) "The focus in a penalty phase trial of a capital case is on the character and record of the individual offender." (*People v. Johnson*, *supra*, 47 Cal.3d 1194, 1249.) The court did not err in excluding Lippold's proposed testimony based on his experience with other families.

3. *Seizure of Defendant's Written Notes*

(15) According to defendant, he spent considerable time at his trial counsel's request preparing an

approximately 50-page manuscript of his life story for use during the penalty phase, but the document was taken by jailers from his prison cell. (Respondent does not dispute defendant's statement of the facts regarding the seizure.) Counsel, who had not seen the manuscript, brought this to the court's attention at an in camera proceeding from which the prosecutor was excluded. The court ordered that the manuscript be produced and kept under seal by the court.

Defendant's appellate counsel assert they requested the manuscript after trial, but that the court was unable to produce it. Defendant contends the seizure and loss of the manuscript deprived him of an opportunity to present a complete defense during the penalty phase. He further contends the loss was irreparable because his alleged serious brain damage raises a question of whether he has the ability to reproduce the work.

Before turning to the merits, we first explain the status of the record. Defendant is correct that the trial court ordered defendant's jailers to place the manuscript in the court's custody so that it could be kept under seal. Later, on March 19, 1990, appellate counsel filed a request to review the transcripts of all in camera proceedings, including the November 13, 1987, hearing at which the court ordered production of the manuscript. The trial court's order did not purport to grant or deny the request but stated that all in camera transcripts had been forwarded to this court. Defendant moved for reconsideration. The trial court denied that motion, again stating that the transcripts had been sent to this court. After further investigation and communication with this court, defendant again sought reconsideration, correctly explaining that no transcripts had been sent to this court. This was confirmed by the superior court clerk. Finally, the trial court granted defendant's request to review the manuscript that had been placed under seal.

According to defendant, however, the manuscript was still not produced. The trial record contains no

further references to this matter, so defendant's assertion cannot be verified. Relying on this omission, respondent contends we should not address the issue of the seized manuscript. Although respondent is technically correct that the record does not prove the manuscript was withheld from appellate counsel, we have no reason to doubt appellate counsel's assertion they were not provided with the manuscript. Indeed, respondent does not dispute that the manuscript has been lost, either by the jail or the trial court. In light of the uncertainty, which appears not to be attributable to defendant's counsel, we shall address the claim on the merits.

Assuming that, as defendant contends, the manuscript was never produced to his appellate counsel, we nevertheless reject the claim on the merits. Defendant contends that, but for the seizure of the manuscript, it would have been available for his defense at trial. This assertion, however, assumes it was in fact not available for his defense. As explained above, the trial court ordered the jailers to submit the manuscript to the court. Although the manuscript may now be missing, we decline to speculate whether it was unavailable to counsel during trial. Nothing in the record suggests that *trial counsel* ever requested the manuscript during the penalty phase. We thus find no error.

Moreover, if trial counsel had so little interest in the manuscript that they did not even seek to read the manuscript themselves, we see no merit in defendant's contention *on appeal* that the manuscript's seizure somehow restricted his penalty phase defense. Thus, the seizure, even if improper, did not prejudice defendant. Prejudice is lacking in other respects. First, appellate counsel contend defendant suffers from severe organic brain damage, which raises serious concerns about his ability to reproduce that work product. This assertion assumes as a fact that defendant is brain damaged. Moreover, the assertion of prejudice is important for

what it does not say. Appellate counsel do not contend defendant attempted to rewrite or reconstruct the life story that was allegedly the subject of the manuscript. The contention is only that he *may* have been unable to do so. That is not a showing of prejudice. (It also seems a bit stretched to contend that defendant, although brain damaged, composed a 50-page life story but that the same brain damage precluded him from doing so a second time.) Second, counsel do not assert that the manuscript would itself have been admissible, but only that it would have assisted counsel at trial. Counsel fail to explain to this court why trial counsel could not have obtained the same information regarding defendant's background by interviewing him. Third, defendant does not point to any mitigating evidence that he was unable to introduce as a result of the seizure of the manuscript. Put differently, he does not show how the manuscript was material or irreplaceable.

4. *Alleged Cumulative Guilt Phase Errors Affecting Penalty Verdict*

Defendant contends there were multiple errors during the trial's guilt phase that raised serious questions about the finding that he intentionally killed the victim. In particular, he points to: (1) the absence of substantial evidence that defendant intentionally killed Tony, (2) the prejudicial failure to present evidence of defendant's organic brain damage, (3) improper instruction on the intent-to-kill requirement of the felony-murder special circumstance, (4) improper destruction of exculpatory evidence, and (5) the seizure of the life story manuscript from his cell. (The last assertion is curious because defendant raises the alleged seizure only in connection with the penalty phase. In this portion of his brief, however, he seems to contend it was guilt phase error.) Defendant contends "there is a reasonable **possibility** that a penalty jury would return a verdict other than death," absent these errors. (Boldface in original.) Defendant does not, however, explain with

any particularity *how* these alleged errors affected the penalty verdict other than to say that they cast doubt on the finding that he intentionally killed the victim. That argument relates, not to the penalty determination, but to the special circumstance finding itself. In short, the point of defendant's argument is not clear. In any event, it is misplaced because we have rejected these claims of guilt phase error. If none of the claimed errors were individual errors, they cannot constitute cumulative errors that somehow affected the penalty verdict. Finally, as we have often noted, defendant "'is entitled to a "fair trial not a perfect one."'" (*People v. Miranda* (1987) 44 Cal.3d 57, 123 [241 Cal.Rptr. 594, 744 P.2d 1127], quoting *Schneble v. Florida* (1972) 405 U.S. 427, 432 [31 L.Ed.2d 340, 345-346, 92 S.Ct. 1056].) If defendant means to suggest the guilt phase was somehow so flawed that it was unfair and thereby influenced the penalty verdict, we reject that contention as well.

5. *Death Penalty as Disproportionate*

(16) Defendant contends the death penalty is disproportionate to his crime and circumstances and thus violates the constitutional proscriptions of cruel and unusual punishment. (U.S. Const., 8th & 14th Amends; Cal. Const. art. I, § 17.) We disagree. The jury found that he was the actual killer and that he intended to kill. "Accordingly, the imposition of the penalty of death on defendant does not violate the Eighth Amendment." (*People v. McLain* (1988) 46 Cal.3d 97, 121, fn. 7 [249 Cal.Rptr. 630, 757 P.2d 569].)

The facts do not cast doubt on this general proposition. Defendant points to the following aspects of the killing: "Beeler had no prior history of violent crimes. There were no eyewitnesses to the killing. Beeler did not know the victim. There was no evidence the burglar was armed when he entered the victim's house. The prosecution conceded that Stevenson returned home during the course of a burglary and

attacked the burglar with his rifle, with sufficient force to cause a large gash in the door of Michael Stevenson's room. There was substantial evidence of a struggle between the victim and his killer, and the victim was shot once with a handgun owned by the victim's brother. The prosecution even acknowledged that the intruder left the victim's house without knowing whether the victim was dead or simply wounded."

Defendant's characterization of the evidence is flawed. The assertion that defendant had no history of violent crime is false and misleading. It is false because he had previously robbed and raped a woman. That is violence. Defendant's view is misleading to the extent it suggests a law-abiding life because he had three burglary convictions. More important, even if we otherwise accept defendant's characterization of the facts, these are hardly circumstances that demonstrate, or even suggest, the death penalty is inappropriate. Rather, they tell a story of a killer who entered the home of an innocent stranger and burglarized it. The resident inadvertently returned home, interrupted the crime, and, after struggling, was shot in the back. The killer left the victim to die.

Defendant also contends the death penalty is inappropriate and "shocks the conscience" in light of his horrible childhood, his brain damage, his efforts to provide for his family, and the fact that his most recent prior conviction was nine years old. We are not persuaded. Neither his childhood, his own family's circumstance, nor his interlude from crime renders disproportionate a death penalty for this defendant's killing of this innocent victim under the circumstances of this case. We consider separately the alleged brain damage (*post*, at pp. 1001-1010), but at this juncture we need note only that (1) there is insufficient evidence in the record on appeal to support the conclusion that defendant does in fact suffer organic brain damage; and (2) evidence of brain damage would not *necessarily* render the death penalty cruel or unusual. (*People v.*

Poggi (1988) 45 Cal.3d 306, 348 [246 Cal.Rptr. 886, 753 P.2d 1082]; cf. *Penry v. Lynaugh* (1989) 492 U.S. 302, 330-335 [106 L.Ed.2d 256, 285-289, 92 S.Ct. 1056] [Execution of a mentally retarded defendant is not categorically prohibited by the Eighth Amendment.].) Moreover, we know nothing from the record in this case of the specifics of the alleged damage and what effect, if any, it might have had on defendant's mental state or actions.

6. *Alleged Penalty Phase Instructional Errors*

Defendant asserts three errors in the penalty phase jury instructions. He first contends the trial court incorrectly "left the impression that implied malice was sufficient to establish the requisite intent to kill" for the felony-murder special circumstance. That contention is more properly considered in connection with the guilt and special circumstance issues, and we have rejected it in that part of the opinion. (*Ante*, at pp. 982-986.) We turn now to defendant's two remaining contentions.

A. *Alleged confusion of aggravating and mitigating factors*

(17a) The trial court instructed the jury with the 1986 revision of CALJIC No. 8.84.1, which set forth the factors for the jury to consider in rendering its penalty verdict. The instruction included the language of Penal Code section 190.3, factor (k) (hereafter factor (k)), which directed the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial...." **(18)** "The language of factor (k) refers to circumstances which extenuate the gravity of the crime, not to circumstances which enhance it." (*People v. Boyd* (1985) 38 Cal.3d 762, 775 [215 Cal.Rptr. 1, 700 P.2d 782].) Defendant does

not object to CALJIC No. 8.84.1. **(17b)** He contends, however, the court erred by giving an additional instruction that "The list of factors which I have just read to you contains every aggravating factor which you may consider." He asserts this statement wrongly instructed the jury that factor (k) could be an aggravating factor as well as a mitigating factor. We are not persuaded.

Defendant requested the additional instruction to which he now objects. Respondent contends the error, if any, was therefore invited. We need not decide whether there was invited error because the instruction of which defendant now complains was not error. As defendant explained in requesting the instruction, it was a correct statement of the law to the extent it made clear the jury could consider only those aggravating factors identified in CALJIC No. 8.84.1. (*People v. Boyd*, *supra*, 38 Cal.3d 762, 775.) Nor can the additional instruction reasonably be read even to suggest that factor (k) could be considered as an aggravating factor. To be sure, as the trial court noted, the proposed instruction could have been more clearly written. "The second sentence in defendant's proposed [instruction] two is inaccurate which reads 'In other words, the factors I have just read to you are the only factors you may consider in aggravation'—because there are factors in mitigation also there." The court, however, deleted this sentence with defendant's consent. Nothing in the remainder of defendant's additional instruction could fairly be taken to mean that factor (k) could be an aggravating factor. The factor (k) instruction itself negated any such meaning. The jury was instructed that factor (k) was "any other circumstance which *extenuates* the gravity of the crime even though it is not a legal excuse for the crime and any *sympathetic* or other aspect of the defendant's character or record *that the defendant offers as a basis for a sentence less than death*, whether or not related to the offense for which he is on trial." (Italics added.) The language of factor (k) could not, even with

the additional instruction, have led a juror to view factor (k) evidence as an aggravating factor. The possibility of the confusion now asserted by defendant was further negated by the giving of his proposed instruction that: "The absence of any particular mitigating factor is not an aggravating factor, and you must not consider the absence of any of the enumerated mitigating factors as a factor in aggravation." In short, to accept defendant's view, we would have to conclude that a juror would believe that he or she was to consider extenuating evidence as aggravating evidence. We reject that view as being unrealistic. **(19)** The proper standard for scrutinizing ambiguous jury instructions is to inquire "... whether there is a reasonable likelihood that the jury misconstrued or misapplied the words ...." (*People v. Clair* (1992) 2 Cal.4th 629, 663 [7 Cal.Rptr.2d 564, 828 P.2d 705].) There was no such likelihood in this case.

B. *Refusal of defendant's proposed instruction on weighing*

Defendant asserts error in the trial court's refusal to deliver his proposed jury instruction No. 10, which stated, "You may return a verdict of life imprisonment without the possibility of parole even if the aggravating factors you find [to be] true outweigh the mitigating factors you find to be true. This is so because your sympathy or compassion for the defendant or for his family, or any other single mitigating factor, can, standing alone, justify a sentence of life imprisonment without the possibility of parole." The refusal was not error. We rejected a similar argument in *People v. Edwards*: "Defendant also contends the court erred in refusing his request to instruct the jury, 'If you determine that the aggravating factors substantially outweigh the mitigating factors, you *may* return a finding of death *or* a finding of life in prison without the possibility of parole.' (Italics added.) In *Boyde v. California* [(1990)] 494 U.S. [370] at pages 376-377 [108 L.Ed.2d at p. 326, 110 S.Ct. at pp. 1195-1196], the high

court upheld an almost diametrically opposite instruction—that the jury 'shall impose' the death penalty if it concluded that the aggravating circumstances outweigh the mitigating circumstances. We expressed misgivings about the word 'shall' in *People v. Brown* [(1985)] 40 Cal.3d at pages 544-545, and footnote 17, and recommended that future courts instruct as was done in this case. We have never suggested the instruction now urged was required." (*People v. Edwards*, *supra*, 54 Cal.3d at p. 842.) The instruction requested by defendant in the present case was not materially different from the one we held was not required in *Edwards*. We adhere to the same view and conclude the trial court properly refused the instruction.

7. *Assorted Previously Rejected Claims*

Defendant briefly asserts six additional claims that he acknowledges "have been rejected in recent opinions of this Court." Two of these issues relate to defendant's alleged brain damage, and are resolved by our decision on that issue. (*Post*, at pp. 1001-1010.) We reiterate our rejection of these contentions as follows:

A. *Legal aliens*

Defendant contends the trial court erred in denying his motion to include lawful resident aliens in the jury pool. We have held that resident aliens are not a cognizable group that is constitutionally required to be included in the jury pool. (*Rubio v. Superior Court* (1979) 24 Cal.3d 93, 98-100 [154 Cal.Rptr. 734, 593 P.2d 595]; see also Code Civ. Proc., § 203, subd. (a)(1) [disqualifying "[p]ersons who are not citizens of the United States"].)

B. *Intercase proportionality*

Defendant contends the absence of any mechanism for intercase proportionality review denies him the opportunity to show his sentence violates the Eighth

Amendment's proscription of cruel and unusual punishment. (U.S. Const., 8th Amend.) We consistently have held that such review is not constitutionally mandated. (*People v. Fierro, supra*, 1 Cal.4th 173, 253.)

C. *1978 sentencing statute*

Defendant contends the 1978 capital sentencing statute is unconstitutional because it lacks the following safeguards: (1) identification of the aggravating and mitigating factors, (2) written jury findings regarding the aggravating and mitigating factors, (3) a burden of proof on the prosecution to establish all aggravating factors beyond a reasonable doubt, and (4) jury unanimity regarding the aggravating factors. We have rejected each of these contentions. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1265 [278 Cal.Rptr. 640, 805 P.2d 899] [identification of factors not required]; *People v. Cox* (1991) 53 Cal.3d 618, 692 [280 Cal.Rptr. 692, 809 P.2d 351] [no constitutional requirement of written findings, jury unanimity, or proof beyond a reasonable doubt].)

D. *Destruction of Beeler's juvenile records*

(20a) Defendant contends the trial court erred by not dismissing the special circumstance allegation as a sanction for the destruction of defendant's juvenile records in Nevada. Defendant had been a resident of that state's Spring Mountain Youth Camp for approximately nine months in 1967 and 1968. Defendant made an offer of proof that in approximately the winter of 1969, all of defendant's records from that camp were intentionally burned. Despite a Nevada statute that seemed to require the sealing and retention of all records after the subject juvenile reached the age of 24 years, the youth authority had a policy of destroying the records at that time. (The parties to this action disputed whether the destruction was lawful.) According to defendant, the destroyed records would have provided mitigating evidence regarding his troubled background, abused childhood, and perhaps other circumstances.

The trial court denied the motion, reasoning as follows: "People versus Zamora [(1980)] 28 Cal.3d 88 [167 Cal.Rptr. 573, 615 P.2d 1361], tells us not every suppression of evidence requires a dismissal. The remedies, if any, need only assure the defendant of a fair trial. Lawful and proper destruction require no sanctions. Illegal and malicious destruction may result in a dismissal. The sanction depends on the materiality of the evidence suppressed, or degree of materiality of the evidence suppressed. Finally, the court must consider the impact of the sanctions upon future cases and future police conduct. The sanctions, if any, must outweigh any benefit that the prosecution gains from the suppression. At the same time, the court must consider the public interest in law enforcement and a sanction that prevents the trial, or appropriate punishment, should be considered carefully. In this case the destruction of records has no sinister conduct attending the destruction. No governmental evil can be cured by dismissing the penalty phase proceedings. The records of Spring Mountain Juvenile Court were destroyed by burning in an effort to maintain confidentiality, at least as indicated by one witness, immediately after they were declared to be a fire hazard. It is improbable that the destruction of juvenile files of this defendant give any advantage whatsoever to the prosecution. It also appears that the lawful [Nevada] authorities controlling the records of defendant's juvenile commitment at Spring Mountain, by habit and custom, have modified the bare written law in that the out-of-state [Nevada] authorities properly construed the language authorizing sealing of transcripts at age 24 to also authorize destruction of such records to maintain confidentiality permanently. This court, therefore, construes the law involving the defendant's juvenile records as follows: The framers of the [Nevada] statute never contemplated that a defendant would, some 20 years in the future, do a capital murder in another state and did not intend that their records should be maintained by the—for the

defendant's benefit so that he might, 20 years later, have access to such mitigating evidence. Through custom and practice the [Nevada] authorities could have, would have, in fact, did lawfully destroy all the defendant's records presumably near age of 24. Therefore, whatever records were destroyed earlier, are totally irrelevant to the issue of sanctions nor are they material. This court now rules there shall be no dismissal of the penalty phase proceedings, nor is the defendant entitled to any other sanction."

We agree with the trial court's disposition of this issue for one simple reason. Regardless of whether the destruction by the Nevada authorities was proper under that state's law, at the time those records were destroyed, which was approximately 20 years before defendant's trial in this action, neither the records themselves nor their destruction had any cognizable nexus whatsoever with the present case. **(21)** As explained above in connection with another of defendant's claims (see *ante*, p. 976), the federal constitutional guarantee of due process imposes a duty on the state to preserve only such "... evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, see *United States v. Agurs* [(1976)] 427 U.S. [97], at 109-110 [49 L.Ed.2d 342, 353-354, 96 S.Ct. 2392], evidence must ... possess an exculpatory value that was apparent before the evidence was destroyed ...." (*Trombetta*, *supra*, 467 U.S. 479, 488-489 [81 L.Ed.2d 413, 422], fn. omitted; *People v. Johnson* (1989) 47 Cal.3d 1194, 1233 [255 Cal.Rptr. 569, 767 P.2d 1047].) "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." (*Arizona v. Youngblood*, *supra*, 488 U.S. 51, 58 [102 L.Ed.2d 281, 289].) "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value

of the evidence at the time it was lost or destroyed." (*Id.*, at p. 57, fn. * [102 L.Ed.2d at p. 288].) **(20b)** Applying these principles to the juvenile records in question, we find no constitutionally improper conduct. As suggested by the trial court, when the records were destroyed, the Nevada officials could not reasonably have been expected to foresee the records might contain some mitigating evidence 20 years later.

8. *Trial Court's Reading of Probation Report Before Sentencing*

(22) On December 16, 1988, the trial court was scheduled to hear several post-trial motions, including the automatic application under Penal Code section 190.4, subdivision (e) for modification of verdict. The court stated, "[The] court has received, read and considered the Probation and Sentencing Report and various letters as well as a commitment of death submitted by the People." Defendant contends this was prejudicial error. Defendant is correct that "the preferable procedure is to defer reading the probation report until after ruling on the automatic application for modification of verdict." (*People v. Lewis* (1990) 50 Cal.3d 262, 287 [266 Cal.Rptr. 834, 786 P.2d 892]; *People v. Hill* (1992) 3 Cal.4th 959, 1012 [13 Cal.Rptr.2d 475, 839 P.2d 984].) "'In making that ruling the judge is limited to consideration of the evidence that was before the penalty jury.' (*People v. Visciotti* [(1992)] 2 Cal.4th 1, 78 [5 Cal.Rptr.2d 495, 825 P.2d 388].) The probation report, of course, was not admitted into evidence." (*People v. Hill*, *supra*, 3 Cal.4th at p. 1013.)

We nevertheless reject defendant's contention of error. "Absent a contrary indication in the record, we assume the trial court was not influenced by the report in ruling on the application." (*People v. Hill*, *supra*, 3 Cal.4th at p. 1013.) The record in this case shows the trial court relied only on the evidence, not the probation report or letters. Moreover, the court carefully reviewed the evidence, including the aggravating and mitigating

circumstances and concluded, "Considering all of the evidence, the court's personal assessment is that the factors in aggravation, beyond all reasonable doubt, overwhelmingly outweigh those in mitigation." On these facts, we hold, "There was no error, and certainly no prejudice." (*People v. Livaditis* (1992) 2 Cal.4th 759, 787 [9 Cal.Rptr.2d 72, 831 P.2d 297]; *People v. Hill*, *supra*, 3 Cal.4th 959, 1013.)

Issues Relating to Alleged Organic Brain Damage

1. *Factual Background of Brain Damage Allegation*

The background of the dispute regarding alleged brain damage is as follows: The jury returned its penalty verdict on July 12, 1988. Sentencing was scheduled for September 2, 1988. Defendant's counsel obtained a continuance of that hearing until November 4, 1988. On that date counsel requested another continuance, explaining they were heavily involved in another case. Counsel also stated:

"Also there is a matter which Mr. Beeler has brought to my attention[.] He only last week learned the significance or possible significance in his case of a head injury he received, subsequent symptoms that apparently he was treated for both in prison and locally. I think we should investigate that.

"The Court: He didn't know he had a head injury when he had a head injury?

"Mr. Standifer: He apparently was unconscious after it so he didn't know all about it, but he did not know the significance of it and did not report it to us.

"The Court: Certainly seems to be something addressed in the motion for new trial.

"Mr. Standifer: That's exactly right.

"The Court: Sure.

"Mr. Standifer: And [the] point of that is that I—we didn't know about it, Mr. Beeler didn't tell us about it because he only recently learned that it might be significant."

The court granted the request for a continuance until December 16, 1988. On that date, the court held an in camera hearing. Counsel stated they had investigated defendant's prior report of a few isolated blackouts, but that defendant had just told them earlier that day he had begun suffering frequent blackouts. Defendant raised an issue of ineffective assistance of counsel and "wished to have another lawyer appointed because he had not received an EKG [*sic*, EEG (electroencephalogram)] and a CAT scan [computerized axial tomography]." Counsel explained that "[a]lthough we had doctors address issues based on the information we had, it was our judgment to this point that those tests were not required. Counsel explained that defendant wanted the court to relieve his counsel or to appoint an additional attorney. Defendant stated that he wanted to be tested with a "CAT Scan and EEG because I feel there is something wrong." The court denied the motion to relieve counsel but continued sentencing again, until January 27, 1989, so that counsel could further investigate the possibility of organic brain damage.

On January 27, 1989, the court granted defense counsel's request for another continuance of approximately 60 days, until March 24, 1989, to proceed with defendant's brain testing.

On March 24, 1989, defense counsel requested yet another continuance. Counsel represented that defendant had been given a PET scan (positron emission tomography) and that counsel had received only two days before this hearing "... a report from a physician indicating that Mr. Beeler may have organic brain damage and I'm asking that the motion for new trial and sentencing be continued to May 5." Counsel presented no evidence to substantiate his claim. Rather, he explained only that "He [the doctor] has given me a report, an oral report, and some documents which indicate his conclusions regarding brain damage and I need to have him finalize those conclusions and results

and I need to have those results analyzed by a forensic neurologist, and I believe that that amount of time is necessary to complete these tasks." The prosecutor objected, but the court concluded, "I think if I simply order they go forward with the motion for new trial and sentencing it would be an abuse of the court's discretion at this time even though it's taken us as long as it has. So over the objection of the People, the court grants the continuance. I'm hoping it's a hard and fast date for sentencing.... [¶] I'm going to suggest that the prosecutor notify the victims that we will probably go on the 5th [of May]. In other words, I allow the continuance to this date with the expectation that we will go forward that day. So let's not come to the courtroom again with the courtroom filled with victims and ask for a continuance again."

Despite the court's warning and the passing of almost 10 months since the verdict (including 8 months of continuances), defense counsel at the May 5, 1989, hearing requested still another continuance, this time on the ground that more time was needed for a defense expert to evaluate defendant's neurological condition. One of defendant's counsel submitted his own declaration setting forth his efforts to obtain an analysis of various tests that had been done and stated that some doctors had told him of problems with defendant's brain. Counsel, however, presented no testimony of any expert even suggesting a neurological problem. The court denied this request for another continuance, and proceeded to deny the motion for new trial and the application to modify the verdict and imposed the death sentence. Defendant contends the trial court erred by denying: (1) the request for a sixth continuance, (2) the motion for new trial, and (3) the application to modify the verdict. We shall address each contention, setting forth additional facts as necessary.

2. *Denial of a Further Continuance*

(23) "Continuances shall be granted only upon a showing of good cause." (Pen. Code, § 1050, subd. (e).) "The granting or denial of a continuance during trial traditionally rests within the sound discretion of the trial judge." (*People v. Howard* (1992) 1 Cal.4th 1132, 1171 [5 Cal.Rptr.2d 268, 824 P.2d 1315].) "The burden is on [the defendant] to establish an abuse of judicial discretion ...." (*People v. Rhines* (1982) 131 Cal.App.3d 498, 506 [182 Cal.Rptr. 478].) "[A]n order of denial is seldom successfully attacked." (5 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) Trial, § 2502, p. 3002.) We conclude the trial court did not abuse its discretion in denying defendant's May 5, 1989, request for a further continuance.

An important factor for a trial court to consider is whether a continuance would be useful. (*Owens* v. *Superior Court* (1980) 28 Cal.3d 238, 251 [168 Cal.Rptr. 466, 617 P.2d 1098].) Defendant acknowledges that to demonstrate the usefulness of a continuance a party must show both the materiality of the evidence necessitating the continuance and that such evidence could be obtained within a reasonable time. (24) In this case, defendant's counsel failed to show either element on the record as of May 5, 1989. First, counsel's declaration was all the court had before [illegible] and that declaration was most equivocal. It repeatedly stated that the so-called newly discovered evidence *appears* relevant" and "*suggests*" problems with defendant's mental state. (Italics added.) Moreover, counsel seemed to assume that proof of some type of organic brain damage would be relevant to a material issue. Counsel's declaration permitted only speculation in that regard. Indeed, counsel never even provided any indication regarding whether the alleged damage was sustained before, during, or after the trial. Second, there was no adequate showing the evidence, even if material, could be obtained within a reasonable time. The lengthy delays and prior continuances permit serious doubt whether the additional time requested would have

yielded meaningful evidence. The declaration also offered no assurance the requested continuance would be sufficient, stating only that "... this doctor *believes* that he can conclude the medical work needed by early August of this year." (Italics added.) In denying the continuance, the court noted in its final remarks, that "I have simply made conclusions from your failure to present anything to the court...." We agree that counsel failed to establish on the record that a further continuance would have been useful. We therefore hold that defendant has failed to show the trial court abused its discretion when it denied his May 5, 1989, request for a further continuance to continue to explore the possibility that he *might* have brain damage that *might* be relevant.

3. *Motion for New Trial*

(25a) Defendant contends the trial court should have granted his motion for a new trial based on the allegedly newly discovered evidence of severe organic brain damage. **(26)** "In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: "'1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits.'" (*People v. Delgado* (1993) 5 Cal.4th 312, 328 [19 Cal.Rptr.2d 529, 851 P.2d 811].) "[U]nless a clear abuse of discretion is shown, a denial of the motion will not be interfered with on appeal." (*People v. McDaniel* (1976) 16 Cal.3d 156, 178-179 [127 Cal.Rptr. 467, 545 P.2d 843]. **(25b)** We find no abuse of discretion because defendant failed to show that a different result would be probable on retrial. The motion for new trial, including the issue of a probable different outcome on retrial, must, of course,

be decided on the evidence actually before the court at that time, not on the basis of evidence that might be developed. As explained above, all the court had before it was counsel's extremely vague and equivocal declaration regarding the alleged results of the brain testing. It was so tenuous that it clearly did not make a different outcome probable, or even remotely likely. This was plainly insufficient to warrant a new trial. An affidavit that is "so vague and general" supports the denial of a motion for new trial. (*People v. Kloss* (1897) 115 Cal. 567, 576 [47 P. 459] [affirming denial of new trial in a murder case].)

Counsel's declaration did not even comport with the statutory requirement for a new trial motion. Penal Code section 1181, subdivision 8 states, "... When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, *the affidavits of the witnesses by whom such evidence is expected to be given*, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as, under all the circumstances of the case, may seem reasonable." (Italics added.) Defendant did not produce a single affidavit by any witness who could have presented credible evidence of his alleged organic brain damage, submitting instead only the declaration of counsel. "It is to be noted that the alleged motion for a new trial, which was made on the ground of newly discovered evidence, was not supported by an affidavit of a witness by whom newly discovered evidence was to be given. (See Pen. Code, § 1181.) The affidavit was made by the attorney for defendant. It thus appears that there was not a sufficient legal basis for a new trial on the ground of newly discovered evidence, and the court would have been justified in denying the motion." (*People v. Ethridge* (1962) 204 Cal.App.2d 279, 282-283 [22 Cal.Rptr. 57]; *People v. Fice* (1893) 97 Cal. 459, 460 [32 P. 531] [no affidavit by the proper witness].) Likewise here,

counsel's declaration was insufficient under Penal Code section 1181. It was also insufficient to show a probable different outcome on retrial.

We conclude the trial court did not abuse its discretion in denying the motion for a new trial based on the allegedly newly discovered evidence of brain damage.

4. *Consideration of Neurological Evidence on Modification Motion*

(27) Defendant contends the trial court erred in taking any action on his automatic application under Penal Code section 190.4, subdivision (e), for modification of the penalty verdict. He reasons as follows: "Where relevant mitigation evidence not heard by the jury is made available to the trial court, the trial court cannot perform the procedural check intended by the section 190.4 motion without either (1) improperly ignoring relevant mitigating evidence; or (2) improperly considering evidence not presented to the jury. Either choice is error." In other words, as defendant would have it, the trial court could neither grant nor deny the application. The argument has no merit. To be sure, in ruling on the application, the trial court shall not consider evidence not presented to the jury. (Pen. Code, § 190.4, subd. (e); *People v. Lewis*, *supra*, 50 Cal.3d 262, 287.) Not true, however, is defendant's correlative premise that the trial court had to consider the "evidence." He relies on *People v. Robertson* (1989) 48 Cal.3d 18, 53-55 [255 Cal.Rptr. 631, 767 P.2d 1109], for the proposition that, in ruling on the automatic application for modification, the trial court should not exclude relevant mitigating evidence from consideration. *Robertson*, however, dealt only with evidence that had been presented to the jury. In the present case, no evidence of the alleged brain damage was presented to the jury. There was no evidence in that regard for the court to consider. Under defendant's strained and novel view, any material brought to the court's attention after

trial—even if, as in this case, it is nothing more than a vague and speculative declaration of counsel—would be "evidence" that would preclude a trial court from ruling one way or the other on an automatic application under section 190.4, subdivision (e). There is no authority in precedent or logic for that view. We reject it.

5. Effect of Alleged Brain Damage on Special Circumstance Finding

Defendant contends the evidence of his alleged brain damage undermines the special circumstance finding that he had a specific intent to kill. (This case is subject to the now-abandoned requirement of a specific intent.) As we have explained in connection with defendant's other claims based on the alleged brain damage, there was no evidence at trial of such damage. To the extent he relies on the post-trial declaration of his counsel, we reject the claim as well. The contention this post-trial information casts doubt on the special circumstance is, in effect, just a different way of arguing that defendant's motion for new trial should have been granted. We have rejected that contention, explaining that counsel's declaration is exceedingly vague and general. Without deciding whether it even rises to the level of being admissible evidence of brain damage, we can confidently conclude that the declaration does not in any way undermine the jury's finding of defendant's specific intent. At best, the declaration suggests that a doctor *might* be able to conclude that defendant *might* have brain damage that *might* have affected his ability to form a specific intent to kill. This is not close to being sufficient to raise any doubt.

6. Ineffective Assistance of Counsel

(28a) Defendant contends his constitutional right to effective counsel was violated by his counsel's failure to investigate sooner his neurological condition. More specifically, he contends counsel were inadequate in two respects. He first contends they "were ineffective for

failing to investigate Beeler's neurological health during trial." He also asserts that, "once trial counsel learned that Beeler suffered from a severe neurological impairment, counsel was ineffective in failing to present expert evidence of this impairment to the court on May 5, 1989," when it denied his request for a further continuance and his motion for new trial. **(29)** "To establish entitlement to relief for ineffective assistance of counsel the burden is on the defendant to show (1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Lewis*, *supra*, 50 Cal.3d 262, 288.)

A. *Investigation during trial*

(28b) Defendant contends the record "... is replete with references demonstrating that counsel had sufficient indications of brain damage to warrant an investigation [of his neurological health] at least by the time of Beeler's penalty phase trial." Defendant points to the testimony of two of defendant's penalty phase witnesses that he claims should have triggered this inquiry. We are not persuaded.

Dr. Lenore Walker, a forensic psychologist, testified defendant suffered from disassociation, i.e., events of memory loss or unawareness of what he was doing. Dr. Stephen Wells, another psychologist, also testified "... there appears to be a very much an element of what is called dissociation [*sic*] involving memory consciousness, a person is—person's awareness of what he is doing." The psychologists did not testify that they suspected any organic brain damage. Nothing in the record supports a conclusion that evidence of memory loss and disassociation should have alerted counsel to a need for neurological testing for organic brain damage. Nor did defendant's own psychologists testify that such testing was needed.

Dr. Walker also testified that, when defendant was a child he was subjected to terrible physical, emotional, and sexual abuse by his stepmother. A childhood neighbor testified likewise, recounting among other things an incident in which defendant was pushed down a flight of stairs. Defendant points to his "long history of mental health problems" and contends this history should have triggered some investigation into a possible neurological link to those problems. Again, nothing in the record supports the conclusion that defendant's terrible childhood and prior diagnoses supported an inference of organic brain damage that would warrant neurological testing.

In short, the record does not support defendant's contention that the evidence at trial should have caused his counsel to seek neurological testing.

B. *Investigation after trial*

Defendant also challenges counsel's performance after the penalty verdict was returned, asserting their "... lack of diligence in procuring an expert witness to enlighten the court about his organic brain damage." This contention assumes as its premise that defendant *in fact* does suffer from organic brain damage. The record on appeal does not support that inference. As we have explained in detail above in connection with other contentions based on the alleged brain damage (*ante,* at pp. 1003-1005), the record contains not a single declaration by any competent expert that defendant has any brain damage of any kind. The only information in that regard is his counsel's declaration seeking a sixth continuance. Whether counsel could offer competent testimony regarding brain damage is most doubtful. (Evid. Code, § 720.) But, even if we assume, solely for discussion, that counsel's declaration could be considered as being evidence, the declaration itself was tenuous hearsay at best. The record does not establish that defendant suffers from organic brain damage. We therefore cannot conclude that counsel were ineffective

for not "... procuring an expert witness to enlighten the court about his [defendant's] organic brain damage." Because the record does not establish that defendant in fact suffers from organic brain damage, the question of whether his counsel should have obtained an expert's opinion about that brain damage is a question that must be raised, if at all, in a petition for writ of habeas corpus. We cannot on appeal conclude that counsel should have obtained expert opinion regarding a "fact" that is not demonstrated in the record to be a fact.

Perhaps defendant means to contend counsel became aware of defendant's brain damage when they learned of defendant's alleged blackouts and thus should have obtained expert opinion regarding the brain damage. Again, this view assumes too much. The occurrence of the blackouts—even if true—does not establish brain damage. Likewise, counsel's knowledge of the blackouts did not mean that counsel knew of brain damage.

Viewed most favorably to defendant, his argument may be construed as follows: when they learned of defendant's blackouts, counsel should more promptly have obtained expert opinion regarding whether the blackouts were caused by organic brain damage. Even in this light, however, the argument fails. First, it begins with the assumption that a defendant's claim of blackouts necessarily imposes on counsel, and the trial court as well, a duty to obtain sophisticated neurological testing to determine whether the defendant has brain damage. This record is insufficient to support such a broad and inflexible rule. One can easily foresee its consequences. Merely by claiming after trial a blackout or series of them, a defendant would be entitled to brain testing that might, as in this case, take months to complete. Delay is not the only concern. Such testing might not establish any brain damage, and even if some damage were proven, whether it would be of any legal consequence is entirely speculative at best. Second, defendant's view is also factually flawed because it

assumes that a person's blackouts, without more, necessarily create a medical need for neurological testing. Defendant fails, however, to establish on the record any such medical protocol.

We acknowledge, however, that, perhaps in an abundance of caution, the trial court in this case authorized neurological testing, and counsel undertook to obtain that testing. Defendant assumes that, once the task was undertaken, counsel had a duty to diligently pursue the matter. Only for the purpose of discussion and without stating any broad rule, we will accept that assumption as being correct. We cannot conclude from this record, however, that counsel were not diligent. Doing so would require us to speculate in detail as to the circumstances faced by counsel and their actions. We decline to so speculate.

For the same reason, defendant fails to establish any prejudice from counsel's alleged failures, whether during or after trial. The faulty premise of defendant's argument is also its faulty conclusion. His premise is that he suffers severe brain damage, and his conclusion is that he was prejudiced because the jury was not told of the brain damage. This argument must fail on appeal because defendant has failed to establish brain damage on the record. At best, all we know from the record is *his counsel's* characterization of what the brain testing *might* show. That is not a sufficient basis on which we can conclude that "it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Lewis*, *supra*, 50 Cal.3d at p. 288.) To the contrary, we cannot make an informed decision regarding what effect, if any, the alleged brain-damage evidence might have had on the jury because we do not know what that evidence would show, indeed, whether it would show any brain damage.

The only "evidence" of brain damage in the appellate record is counsel's declaration. We doubt defendant means to suggest that the jury's verdict would have been different if they had been provided with

counsel's declaration. If, however, that is his contention, we reject it. It seems obvious that a jury would be most skeptical of counsel's lay statements regarding his client's neurological condition. Such information would not be from an unbiased source. Nor would it be from a knowledgeable source. Indeed, whether counsel would even be competent to testify is doubtful. (Evid. Code, § 720.)

Moreover, apart from the fact that the information was from counsel, we cannot conclude the substance of the information contained in counsel's declaration would have made a more favorable result reasonably probable. As we have already explained, the record does not sufficiently establish that defendant suffers from any neurological malady, much less one that might have affected the verdict. We are asked to speculate how a jury might have reacted to highly speculative evidence—if it was evidence—of possible brain damage. We decline to engage in such double speculation.

In summary, we cannot conclude on appeal that defendant was denied effective assistance of counsel. The question of whether there was ineffective assistance of counsel is properly left to a habeas corpus proceeding.

Disposition

The judgment is affirmed in its entirety.

CONCURRING AND DISSENTING:

MOSK, J.,—

Concurring and Dissenting.—I concur in the judgment as to guilt, death eligibility, and noncapital sentence. After review, I have found no reversible error or other defect.

I dissent, however, from the judgment as to the sentence of death.

I agree with Justice Kennard that, by handling the matter relating to Juror Coley as it did, the superior

court committed prejudicial error under the United States Constitution. I join in her persuasive analysis.

I write separately to express my view that reversal is required without regard to the federal charter.

The superior court committed error under California law. Such a conclusion is implicit in Justice Kennard's discussion.

This error is reversible in and of itself. I do not overlook section 13 of article VI of the California Constitution: "No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Article VI, section 13, however, was effectively abrogated in *In re Carpenter* (1995) 9 Cal.4th 634 [38 Cal.Rptr.2d 665, 889 P.2d 985]. There, a bare majority of this court reversed a judgment without expressing any opinion whether a "miscarriage of justice" had resulted and indeed without even examining the "entire cause, including the evidence." I follow that precedent here.

For the foregoing reasons, I would reverse the judgment of death.

CONCURRING AND DISSENTING: KENNARD, J.,–

Concurring and Dissenting.–I concur in the majority's affirmance of the judgment as to guilt and the special circumstance but not as to the penalty of death.

The father of Juror Michael Coley, one of the jurors in this case, died during the jury's deliberations over whether defendant Beeler should receive the death penalty. The trial court then met ex parte with Juror Coley and, without inquiring into his emotional

condition or giving any admonition to guard against a rushed or poorly considered verdict, directed Juror Coley to resume deliberations immediately after the death of his father under a one-hour deadline. The majority holds that the trial court did not err and that the verdict of death returned by the jury under these circumstances is sound.

Justice Baxter and I both agree that the trial court erred. Unlike Justice Baxter, however, I am of the view that we must conclude on this record that the error was prejudicial. Therefore, I would not leave this issue for resolution on habeas corpus, but would resolve it on appeal and reverse the judgment as to the penalty of death.

I

On a Tuesday morning, the start of the third day of the jury's penalty phase deliberations, Juror Coley informed the court clerk that his father, with whom he had a "close relationship," had just died and that he needed to leave the state that afternoon on a 2 p.m. flight to attend his father's funeral. The court met briefly with Juror Coley around 10 a.m. Defendant was not present, nor was his counsel or the prosecutor. Both attorneys were together at another courthouse and had telephoned the court at 9 a.m., at which time the bailiff told them of Juror Coley's situation but not of the court's plans to talk to Juror Coley. When both attorneys again called the court at 9:40 a.m., the bailiff informed them that Juror Coley would be coming to court at 10 a.m. Counsel proceeded directly to court and arrived at 10:20 a.m., after the court had concluded its ex parte meeting with Juror Coley.

In its ex parte meeting with Juror Coley, the trial court first discussed the matter with Juror Coley off the record. The court then summarized their discussion on the record. Without inquiring into Juror Coley's emotional state or giving him or the other jurors any

admonitions, the court instructed him to resume deliberations with the jury for approximately an hour, at which time the jury would adjourn until the following Monday, six days later.

Deliberations resumed. When counsel and defendant arrived, the defense objected to continuing deliberations and moved to replace Juror Coley with an alternate juror. The trial court denied the request. A short time later, less than an hour after it had resumed deliberations, the jury announced it had reached a verdict. The trial court inquired of the jury panel whether the verdict had been affected by the death of Juror Coley's father or by the deadline posed by Juror Coley's imminent departure. The jury foreperson answered "no" to both questions; no other juror responded. The jury returned a verdict of death.

II

The majority analyzes the trial court's conduct in directing the jury to continue deliberations in the manner it did after the death of Juror Coley's father solely in terms of Penal Code section 1089, which provides that if a juror "upon ... good cause shown to the court is found to be unable to perform his duty, or ... requests a discharge and good cause appears therefor, the court may order him to be discharged ...." More fundamental constitutional rights, however, are also implicated by the trial court's course of action.

"Due process means a jury capable and willing to decide the case *solely* on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." (*Smith v. Phillips* (1982) 455 U.S. 209, 217 [71 L.Ed.2d 78, 86, 102 S.Ct. 940], italics added.) At the penalty phase as well as the guilt phase of a capital trial, the jury "must stand impartial and indifferent"; its "'verdict must be based upon the evidence developed at the trial,'" and may not be

influenced by any other external consideration. (*Morgan v. Illinois* (1992) 504 U.S. 719, 726-728 [119 L.Ed.2d 492, 501-502, 112 S.Ct. 2222, 2228-2229].) Indeed, at the penalty phase there is a "heightened 'need for reliability in the determination that death is the appropriate punishment'" (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 340 [86 L.Ed.2d 231, 246, 105 S.Ct. 2633]), and for "the responsible and reliable exercise of sentencing discretion" (*id.* at p. 329 [86 L.Ed.2d at p. 239]).

Here, the events surrounding the death of Juror Coley's father were potentially "prejudicial occurrences." (*Smith v. Phillips*, *supra*, 455 U.S. 209, 217 [71 L.Ed.2d 78, 86].) The trial court's response, however, formulated without the presence or knowledge of defendant and his counsel, aggravated unacceptably the risk that the jury would not decide the case "solely on the evidence before it" (*ibid.*) in a manner satisfying the "heightened 'need for reliability'" (*Caldwell v. Mississippi*, *supra*, 472 U.S. 320, 340 [86 L.Ed.2d 231, 246]) in capital sentencing.

The trial court's error here was not the mere fact, without more, that a juror continued to sit after the death of an immediate family member. Rather, the error has three aspects: (1) The trial court's requirement that Juror Coley immediately resume deliberations on the morning of his father's death without inquiring into or making a record of Juror Coley's emotional condition and without giving him or the other jurors any admonition not to rush their deliberations. (2) The court's requirement that the jury resume deliberations for an hour under the condition that if it did not reach a verdict within that brief time it would have to return six days later. This schedule created a great risk that Juror Coley and the other jurors, unconsciously or otherwise, would hasten their deliberations and suppress any uncertainties or disagreements to reach a verdict within an hour so that Juror Coley could be on his way and so that they would not have to return a week later to resume deliberations.

(3) The court's action in reaching these decisions by an ex parte and partially unrecorded proceeding with Juror Coley, thereby denying defendant and his counsel an opportunity to participate, and the court's refusal to reconsider the course it had adopted once defendant and his counsel did appear and object.

Although not every juror who suffers a death in the family will need to be discharged, the trial court's mode of proceeding here failed to ensure that Juror Coley and the other jurors would return an unhurried verdict that was the product of composed and deliberate reflection. As the concurring and dissenting opinion by Justice Baxter aptly observes, courts have long recognized the human reality that the death of an immediate family member can have a profound effect on jurors and can disrupt the calm, dispassionate, and focused deliberation they must bring to bear on their sworn task of deciding guilt or, as here, whether a defendant should be put to death. Accordingly, in this case there was a great risk that the emotional trauma of the death of his father would cloud Juror Coley's deliberations, as well as a risk that it would also distract the other jurors.

The trial court, however, did not inquire into Juror Coley's emotional condition. It did not ask him whether he was distressed or whether he felt capable of resuming deliberations immediately. It did not give Juror Coley or the other jurors any admonitions to ensure that deliberations continued in a calm, unhurried manner.

Instead, the trial court exacerbated the potential for prejudice by directing Juror Coley to resume deliberations with the other jurors under the pressure of returning a verdict within an hour to avoid having to return a week later. That deadline created a strong incentive for the jurors to reach a verdict within that brief period, however much they might attempt to put that incentive out of their minds and deliberate fully and conscientiously. The jurors should not have been placed in that compromising position. (See *People v.*

Hutchinson (1969) 71 Cal.2d 342, 346, 351 [78 Cal.Rptr. 196, 455 P.2d 132] [bailiff's remarks at the end of a day of deliberations that if jury did not reach verdict in a few minutes it would be locked up overnight were "'likely to have influenced the verdict improperly'"]; *People v. Carter* (1968) 68 Cal.2d 810, 817 [69 Cal.Rptr. 297, 442 P.2d 353] [conviction reversed; jury returned verdict 10 minutes after being told that if there was no verdict within a half-hour the jury would be locked up for the night; court looked to whether "the independent judgment of the jury [was displaced] in favor of considerations of compromise and expediency"]; *People v. Crowley* (1950) 101 Cal.App.2d 71, 78-79 [224 P.2d 748] [conviction reversed; jury, upon being told at 4:30 p.m. that if no verdict was reached by 5 p.m. the jury would be locked up for the night, returned a verdict at 5 p.m.].)

Finally, the trial court acted without the participation or presence of counsel or defendant. This ex parte proceeding further contributed to the error, for had counsel and defendant been present when the court spoke to Juror Coley, there doubtless would have been inquiry into Juror Coley's emotional condition and objection to resuming deliberations for the brief period before Juror Coley had to depart. Defense counsel did raise these objections immediately upon being informed of what the trial court had done, before the jury returned its verdict.

"[A] defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745 [96 L.Ed.2d 631, 647, 107 S.Ct. 2658].) In particular, due process and the right to counsel give the defendant the right to be present with counsel at communications of substance between the court and a juror. (*People v. Wright* (1990) 52 Cal.3d 367, 402 [276 Cal.Rptr. 731, 802 P.2d 221].) "'This rule [against ex parte communications] is based on the

precept that a defendant should be afforded an adequate opportunity to evaluate the propriety of a proposed judicial response in order to pose an objection or suggest a different reply more favorable to the defendant's case.' [Citations.]" (*Ibid.*)

Here, had defendant and his counsel been present, they would have contributed to ensuring the fairness of the jury's deliberations by probing whether Juror Coley was emotionally capable of deliberating in the manner required by the California and federal Constitutions and by making certain that the jury was not subject to the external pressure of a deadline. This is shown by the questions and objections the defense did pose once counsel and defendant arrived in court. Thus, the trial court's ex parte proceeding was error.

Because "such [ex parte] communications ... constitute federal constitutional error," reversal is required unless the prosecution can establish from the record that the error is "harmless beyond a reasonable doubt." (*People v. Wright*, *supra*, 52 Cal.3d at p. 403; see also *People v. Whitt* (1990) 51 Cal.3d 620, 671 [274 Cal.Rptr. 252, 798 P.2d 849] (conc. & dis. opn. of Kennard, J.).) The prosecution has not carried its burden of showing the error harmless beyond a reasonable doubt on the record before us. [fn. omitted]

Nor can the trial court's decision to proceed ex parte be excused, as the majority attempts to do, on the ground that it was merely a brief, routine administrative communication. Juror Coley was not asking where he could get a cup of coffee or how to get reimbursed for mileage. He was informing the court of an emotionally disturbing event that had just occurred and of his need to leave the state immediately. In acting as it did, the trial court made an ex parte decision, without the participation of the defense, as to whether Juror Coley was capable of continuing deliberations and whether deliberations should resume under the deadline presented by Juror Coley's impending departure. These are not mere administrative decisions.

III

The majority misguidedly attempts to support its conclusion that no error occurred by relying on the record's silences as to Juror Coley's emotional state and the effect of the trial court's deadline on the jury's deliberations. Initially, it is important to recall that the trial court did not record its entire conversation with Juror Coley but only recited a summary of the information the court had received from Juror Coley. The majority holds that defendant's claim fails because this partial record does not show a request by Juror Coley to be discharged, does not show a request by Juror Coley that he not be required to deliberate on the day of his father's death, and does not show that any other juror was affected by the circumstances.

These gaps in the record, however, are not chargeable to defendant. A significant part of the trial court's error was its failure to permit defendant to make a full record of the relevant circumstances or to make such a record itself. In doing so the court did not only deny defendant the opportunity to make a *contemporaneous* record (important when attempting to inquire into subjective and transient mental conditions like a juror's emotional state after a death in the family). It also denied defendant *forever* the opportunity to make a record of the effect of the death of Juror Coley's father and the trial court's deadline on the deliberations and mental processes of Juror Coley and the other jurors, because under Evidence Code section 1150 such matters may only be inquired into before the verdict is reached. [fn. omitted] Evidence Code section 1150 prohibits jurors from testifying as to "the effect of [any] statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." (Evid. Code, § 1150, subd. (a); see also *People v. Hutchinson*, *supra*, 71 Cal.2d at p. 350 ["The only improper influences that may be proved

under section 1150 ... are those open to sight, hearing, and the other senses and thus subject to corroboration."].) Evidence Code section 1150 codifies the long-standing rule that a juror "'may testify to any facts bearing upon the question of the existence of the disturbing influence, but he cannot be permitted to testify how far that influence operated upon his mind.'" (*People v. Stokes* (1894) 103 Cal. 193, 197 [37 P. 207].) Although Evidence Code section 1150 prohibits postverdict inquiries into a juror's mental processes, it does not bar preverdict inquiries. "By its very language, this section applies only to postverdict inquiries into how error or misconduct had affected the juror in reaching the verdict. [Citation.] The section does not prohibit individual questioning of jurors [during deliberations] to assure the court there will be no *future* harm, to obviate any such harm, or to strengthen the effectiveness of an admonition." (*People v. Cooper* (1991) 53 Cal.3d 771, 838 [281 Cal.Rptr. 90, 809 P.2d 865], original italics.)

The majority's reliance on the record's silences erroneously imposes on defendant the consequences of the trial court's error and the burden of proving it harmless. [fn. omitted] As the United States Supreme Court has held, violations of fundamental rights cannot be ignored simply because "the precise consequences ... cannot be shown from a trial transcript." (*Riggins v. Nevada* (1992) 504 U.S. 127, 137 [118 L.Ed.2d 479, 491, 112 S.Ct. 1810, 1816].) "The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny. [Citations.] Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience." (*Estelle v. Williams* (1976) 425 U.S. 501, 504 [48 L.Ed.2d 126, 130, 96 S.Ct. 1691]; see also *People v. Stokes*, *supra*, 103 Cal. at pp. 198-199 [reversing conviction where an "'irregularity was shown which may have influenced'" the

jury's verdict because "[w]e cannot say that the verdict of guilty is based wholly upon the evidence introduced at trial"].)

Accordingly, the majority's attempt to support its position by resting on a record that the trial court's error has in crucial respects left forever mute must fail. Because reason, principle, and common human experience teach us that a deadline for deliberation and the death of a father are both substantial impediments to calm, dispassionate, focused decisionmaking; because the trial court took no steps to ameliorate the impact of these impediments; and because nothing in the record shows that these impediments did not have their ordinary and expected effects in this case, I would reverse the penalty phase judgment. [fn. omitted]

IV

When a juror has suffered a death in the family, the trial court at a minimum should conduct a sensitive inquiry into whether the juror is able to continue deliberations or will be able to do so after a reasonable interval. Appropriate admonitions to the affected juror and to the other members of the panel may help assure that if and when deliberations resume they continue in a calm and dispassionate manner, focused solely on the evidence, and without any rush to judgment. The resumption of deliberations can be scheduled so that the jurors do not deliberate under the pressure of a deadline. The defendant can be afforded an opportunity to participate in the decision as to how best to avoid the substantial risk of prejudice inherent in the situation and to bring out any relevant circumstances that the trial court has not explored.

None of that occurred in this case, however. Accordingly, I would reverse the judgment of death.

CONCURRING AND DISSENTING:
BAXTER, J.,–

Concurring and Dissenting.—I respectfully disagree with the majority's conclusion that the trial court did not err in its handling of the circumstances that arose on the death of Juror Coley's father. I concur, however, in the majority's judgment affirming defendant's conviction and death sentence because the record on appeal does not provide a basis for determining that the error was prejudicial.

Put simply, the situation was this: Juror Coley's father had died within a few hours before Coley returned to court on Tuesday for the third day of penalty deliberations. Coley told the court he was emotionally close to his father and had to leave early to fly to the funeral. The court told Coley to resume deliberations, which would be recessed in time for Coley to board his flight, and that he must return the following Monday unless there was some other severe problem that prevented his return at that time. The court did not offer the juror any guidance how to proceed. In particular, he was not admonished to refrain from telling the other jurors of the death, and he was not told that the press of time—either for getting to the airport or returning the following week—must not affect his independent judgment or the deliberations of the other jurors.

This lack of any precaution created a situation rife with the possibility of prejudice. For most people, there are few, if any, situations that are more debilitating and distracting than the hours of grief shortly after the loss of a mother, father, child, or sibling. This conclusion requires no judicial expertise; it is inherent in human experience. Courts have long recognized that a juror who has very recently suffered a death in his or her immediate family is often in an emotional state not suited for jury deliberations, especially when the defendant's very life is at stake. (See Annot., Illness or Death of Member of Juror's Family as Justification for Declaring Mistrial and Discharging Jury in Criminal Case (1928) 53 A.L.R. 1062; 1 Wharton's Criminal Law

(14th ed. 1978) § 61, p. 325.) In one of the earliest reported cases, the families of two jurors became ill during a murder trial, and those jurors were excused. The court noted that not every illness in a juror's family would warrant excusal for cause, and that good cause had not been shown in that case because the record did not show the nature or severity of the illnesses or that the jurors needed to be with their families. The court explained, however, what would be good cause if shown. "It certainly requires no argument to show that, if the wife or child of a juror is at the point of death, he would not be in a state of mind to discharge the duties which devolved upon him, with that degree of patience, calmness and deliberation, which was due in the investigation of cases of this magnitude and importance; and *it would unquestionably be the duty of the court to discharge a juror under such circumstances*." (*Parsons v. The State* (1853) 22 Ala. 50, 53, italics added.) Although the observation was obiter dictum, the same court later made clear that serious illness or death in a juror's family was of extreme importance, especially in a capital case. (*Hawes v. State* (1890) 88 Ala. 37 [7 So. 302, 311] (*Hawes*).) Indeed, the court rejected the capital *defendant's* contention that a juror whose wife became critically ill should not have been discharged. The court found a manifest necessity for the discharge, pointing to its prior decision in *Parsons*, *supra*, 22 Ala. 50, and to an intervening decision by another state's high court that the death of a juror's son required the juror's discharge. (*Hawes*, *supra*, 7 So. at p. 311, citing *State v. Davis* (1888) 31 W.Va. 390 [7 S.E. 24] and *Commonwealth v. Fells* (1838) 36 Va. (9 Leigh) 613, 618-619 [impending childbirth by juror's wife held to be a necessity for juror's discharge].)

The development of the law on this point was subsequently examined by the Georgia Supreme Court in a capital case in which it rejected the defendant's plea of double jeopardy based on his claim that in a prior trial a juror should not have been discharged

merely because his mother had died. After canvassing earlier cases, the court eloquently explained, "As civilization and refinement have progressed, there has been a growing disposition on the part of the courts to recognize the influence of the feelings and emotions upon the mind, as producing this necessity [for discharge].... [¶] ... One whose mind is disturbed and distracted by sudden grief is certainly in no condition to discharge the grave and responsible duty of trying another for his life. What judge would be in a fit condition to preside on the trial of a capital case, upon being summoned to the deathbed of his wife, his child, or his mother? And would any court hold that a judge who is informed, while trying a case, that his wife has just died, cannot return to his home, and attend her funeral, but must go on with the trial? No man of ordinary sensibilities, it seems to me, would be in a proper state of mind to discharge his functions as a judge on the trial of a case, under such circumstances, and he should not be compelled to do so. As was said in the case of *State v. Tatman* [(1882) 59 Iowa 471 (13 N.W. 632)], 'the law makes no such inhuman requirements.' If what has been said is true as to a judge, it is equally true as to a juror. In order to perform his duty properly, he must give his close and undivided attention to the testimony, as delivered by each witness, and to the law, as given in charge by the court. He must carry both in his mind, and carefully apply the one to the other, and it is often necessary that he should make nice distinctions in the application of the law. It is not to be expected that a juror will perform this duty properly, under the circumstances shown by the record in this case. The question to be considered is, not whether the juror, in view of the greater importance of trying the prisoner than of paying the last tribute of affection and respect to his departed mother, should put aside his grief, and proceed undisturbed in the performance of his duty, but whether, as a matter of fact, he is capable of doing this.

If not, the ends of justice require that he be discharged from the jury. What was said by the court in the case of State v. Davis [(1888) 31 W.Va. 390 (7 S.E. 24)] where the juror was discharged on account of the death of his son, will apply equally in the present case: 'Observation teaches us, if, indeed, we have not learned from sad experience, that the natural result of information suddenly imparted to a father, of the death of a child, is to unfit him, for the time, to attend to business.... His grief would naturally unfit him for the discharge of such an important [jury] duty. And if, as the court said in Fell's Case [(1838) 36 Va. (9 Leigh) 613], the object of the trial is to obtain a fair, just, and impartial verdict, there is little prospect of it, under such circumstances. This is one of the cases spoken of in the opinion in that case, where a juror is, from the peculiar condition of his mind and feelings, manifestly disqualified from bestowing on the case that attention and impartial consideration which is necessary to a just verdict." (*Stocks v. State* (1893) 91 Ga. 831 [18 S.E. 847, 849].)

Other courts have embraced the same principle. "It requires no argument to show that the effect upon the mind of the juror upon receiving information of the death of his mother was to render him incapable of that calm and deliberate consideration and reasoning which is due in the investigation of cases of this importance and magnitude [i.e., murder case]." (*Spelce v. State* (1924) 20 Ala.App. 412 [103 So. 694, 698].) In *Salistean v. State* (1927) 115 Neb. 838 [215 N.W.107, 53 A.L.R. 105] (*Salistean*), an arson prosecution, a juror's newborn child died and his wife was seriously ill after the birth. He was discharged. The court compassionately observed, "The serious illness of the wife of the juror and the death of his child would, as a matter of common knowledge, have caused him distress of mind and incapacitated him from giving the case any consideration. To have continued with the trial under such conditions would have been inhuman. It would have been equivalent to trying the case to eleven

jurors." (*Id.*, at p. 109; *Woodward v. State* (1900) 42 Tex. Crim. 188 [58 S.W. 135, 139] [child of juror in murder case became critically ill].)

More recent cases, though not in the vivid language of our learned judicial predecessors and though arising in a variety of contexts, continue to reflect the recognition that a death in a juror's family raises a serious question of his or her ability to deliberate in the death's immediate aftermath. (*Weaver v. State* (1969) 45 Ala.App. 243 [228 So.2d 857] [reversing manslaughter conviction on ground that mistrial should have been granted when juror's mother died]; *United States v. Smith* (9th Cir. 1980) 621 F.2d 350, 351 [defendant held to have impliedly consented to mistrial when juror's mother had stroke]; *Malota v. State* (Fla.Dist.Ct.App. 1976) 336 So.2d 1267, 1268 [affirming judgment rendered after a replacement juror was substituted for juror whose nephew was killed]; *Allen v. State* (Tex.Crim.App. 1993) 867 S.W.2d 427, 430 [approving excusal of juror whose aunt and brother-in-law died]; *People v. Portalatin* (1980) 105 Misc.2d 725 [433 N.Y.S.2d 57, 58] [approved mistrial declared when juror's father suffered stroke].)

I do not agree with the suggestion in some of the foregoing cases that a family death necessarily *requires* the juror's discharge. In my view that goes too far. I discuss those cases, however, because they reflect a long-standing acknowledgment that a death in a juror's immediate family can have, at least temporarily, a profound effect on a juror's ability to deliberate. Any such diminution of the juror's ability is of the gravest importance when the decision is whether the defendant shall live or die.

This sensitive situation arising from the death of Juror Coley's father was made even more troublesome by the time deadline facing Juror Coley. He was faced with a situation in which he had an incentive for the jury to return a verdict as soon as possible. His flight was scheduled to depart within hours. (Indeed, the

common realities of travel suggest the court allowed him barely enough time, if that, to leave the courthouse, travel to the airport, handle preboarding chores, and board the flight.) The court had told him that, if the jury did not return a verdict before then, he would be recalled the following week, beyond the time the jurors had been told would be necessary for the trial. Moreover, Juror Coley would have had to leave his grieving family after a very short time and, in all likelihood, would still have been upset and unsettled by his father's untimely death. The pressure to decide defendant's fate with undue dispatch was plainly great.

The likely pressure on the other jurors also cannot be discounted. It would be fanciful to believe Juror Coley did not tell them of his father's death, as momentous an occasion as one is likely to bear. Indeed, absent such information, they would have been perplexed as to why deliberations were being truncated that day. In short, they almost certainly knew of the death and the time pressure. As the *Salistean* court, *supra*, 215 N.W. 107, 109, perceptively observed, "*the sympathy of the other jurors would naturally have been with him in his misfortune and tend to render them anxious to dispose of the case as quickly as possible.* Under such circumstances the jury would not give the case the careful consideration which the importance of the issue merited." (Italics added.) Likewise here, in addition to having sympathy for Juror Coley, the other jurors (and Coley himself) were faced with the prospect of having to return several days later if they could not return a penalty verdict within approximately an hour. And, Juror Coley was faced with the prospect of burying his father while wrestling with the weighty issue of whether defendant should live or die. Any normal person would be tempted to shed the latter burden so as to be able better to bear the former. Under these circumstances, I am troubled by the fact that—*within the hour* after the court directed Juror Coley to resume deliberations—the jury returned its death verdict.

We have not previously had the same situation before us, but we have acknowledged the difficulty encountered by a juror who has suffered such a family loss. In *In re Mendes*"(1979) 23 Cal.3d 847 [153 Cal.Rptr. 831, 592 P.2d 318] (*Mendes*), the defendant objected to the trial court's having excused without a hearing a juror whose brother had died the previous night. We cautioned that a juror should not be excused without a hearing "[u]nless the facts clearly establish a sufficient basis on which to reach an informed and intelligent decision" that good cause for the excusal is present. (*Id.*, at p. 852.) Even though no hearing had been held and although we knew nothing of the circumstances, we explained that we had "... no difficulty, in the case before us, in concluding that the reason for [juror] Mrs. McQuown's request to be excused clearly constituted 'good cause.' ... [*N*]*ormal grief would make it exceedingly difficult* for Mrs. McQuown to concentrate on the evidence, the arguments of counsel, the court's instructions and the jury's deliberations. In our view, a hearing would have been pointless and perhaps callous." (*Ibid.*, italics added.) In a later capital case, we upheld the trial court's summary discharge during penalty deliberations of a juror whose mother had died the preceding night. (*People v. Ashmus* (1991) 54 Cal.3d 932, 986-987 [2 Cal.Rptr.2d 112, 820 P.2d 214] (*Ashmus*).) We observed that "... a mother's death is 'obviously ... a tragic and disturbing event.' " (*Id.*, at p. 987) I agree with the majority that *Ashmus*, *supra*, 54 Cal.3d 932, and *Mendes*, *supra*, 23 Cal.3d 847, are factually distinguishable from the present case because in those cases the jurors had requested to be discharged, whereas the present record does not reflect that Juror Coley made such a request. I believe, though, that the distinction misses the mark. In neither case did this court place any importance on the request itself. Rather, our basic point was that the situation, i.e., a death in the juror's family, is so patently fraught with difficulty that no inquiry of record is

necessary to establish that fact. It seems to me the logical converse of this principle is that a hearing is required before allowing the juror to proceed immediately with further deliberations.

The substance of the ex parte communication between the court and Juror Coley did not ameliorate the situation. (I agree with the majority that the mere fact of the communication was not error. Some administrative discretion must be allowed the trial court in dealing with unexpected circumstances.) To the contrary, the communication worsened the problem because the court did nothing to assure that deliberations would be unaffected by Juror Coley's loss. Indeed, the court failed even to inquire on the record whether Juror Coley wished to be discharged from further service. Faced with a circumstance that had an obvious potential for creating problems, especially for Juror Coley's ability to deliberate properly, the trial court should have inquired at a minimum in some detail and *on the record* as to Juror Coley's emotional state and cautioned him not to let his father's death affect his deliberations, specifically not to rush them. The court also should have directed Coley not to inform the other jurors of the problem. By contrast, when Juror McCoskey had emotional problems with the trial and discussed them with the court, the court properly cautioned her that '"... because we've talked to you privately that shouldn't affect any of your decisions in any regard ....' " (Maj. opn., *ante*, at p. 974.)

I do not suggest that a juror who has suffered a family death cannot under any circumstance be allowed to continue deliberations. Nor do I suggest that Juror Coley was unable to continue deliberations, even in the immediate aftermath of learning of his father's death. Of course, a trial court has discretion to determine whether and when such a juror should be allowed to resume deliberations. Danger inheres, however, in allowing the deliberations to continue within only hours of the death. Courts have long recognized the extrinsic

and extreme stress such an event interjects into the deliberations. (*Ante*, at pp. 1018-1022.) When the decision facing the jury is literally a matter of life and death for the defendant, prudence requires that, when the court is notified of the juror's tragedy, the court make a reasonably detailed inquiry *on the record* to determine the juror's ability to continue deliberations. Here the trial court's action (or rather lack of it) was less an exercise of discretion than it was an abandonment of that discretion. (Cf. *People v. Marks* (1988) 45 Cal.3d 1335, 1341 [248 Cal.Rptr. 874, 756 P.2d 260] ["We find illogical the notion that an agreement not to hear a matter constitutes a hearing of the matter."].) I believe the trial court erred in not conducting a meaningful inquiry on the record, preferably after counsel arrived in court, into Juror Coley's ability to resume deliberations under the circumstances.

The situation was exacerbated when counsel (defense and prosecution) arrived in court. Defense counsel promptly and in reasonable detail stated his concerns, which, as I have explained, were valid. At that point, the court should have attempted, although belatedly, to conduct the proper inquiry into Juror Coley's circumstances and to determine whether he should have been allowed to continue deliberations that day. The court also should have inquired whether Juror Coley had told the other jurors of his circumstance and the fact that deliberations would have to resume a week later if a verdict were not returned before he left early that day. Instead, the court rejected all of counsel's objections, except to state it would explain that counsel's earlier absence was not improper. In short, the court repeated its earlier error of not conducting an adequate inquiry and not making any informed determination whether deliberations should continue that day.

Nevertheless, I concur in the majority's judgment affirming the death sentence because the trial court's error, i.e., the failure to inquire adequately into Juror

Coley's willingness and ability to serve, deprives us, as it did the trial court, of any basis on which to make an informed decision, based on the record, regarding whether Juror Coley should have been allowed to proceed. We simply do not know the specific facts of Juror Coley's mental state, whether by his own account or by those who observed him, or any facts regarding whether he communicated his circumstances to the other jurors, or whether the jury rushed its verdict. We therefore cannot properly decide on appeal that the error was prejudicial. That question can be decided on an informed basis only if and when it is raised in a petition for a writ of habeas corpus.

Appellant's petition for a rehearing was denied June 21, 1995. Mosk, J., and Kennard, J., were of the opinion that the petition should be granted.

FOOTNOTE 1. The two cases relied on by the majority, *People v. Ashmus* (1991) 54 Cal.3d 932, 986-987 [2 Cal.Rptr.2d 112, 820 P.2d 214] and *In re Mendes* (1979) 23 Cal.3d 847, 852 [153 Cal.Rptr. 831, 592 P.2d 318], for its conclusion that the trial court did not err in acting ex parte are not to the contrary. Both cases involved the trial court's discharge without a hearing of a juror after a death in the juror's immediate family. The ex parte *discharge* of a possibly impaired juror as occurred in *Ashmus* and *Mendes*, whether or not in compliance with Penal Code section 1089 and whether or not the juror is actually impaired, moots any constitutional question because it removes any possibility that an impaired juror would sit in judgment in the case. Any error in proceeding to discharge the juror in the absence of counsel and the defendant could not harm the defendant's right to an impartial jury, nor could the presence of the defendant and his counsel have further increased the impartiality of the jury, since the possibly impaired juror was no longer on the panel. By contrast, the ex parte decision in this case to *retain* a possibly impaired juror (not to mention the further ex

parte decision to have the jury deliberate under deadline) was not similarly harmless. It risked denying defendant his right to an impartial jury; furthermore, the presence of defendant and his counsel would have reduced the risk of that erroneous and unfair outcome occurring.

FOOTNOTE 2. Accordingly, the trial court's *postverdict* inquiry of the jurors was improper and cannot be used to support the conclusion that no error occurred. The court's questions to the jury asked about the influence of the death of Juror Coley's father and of Juror Coley's imminent departure on the mental processes of the jurors in arriving at their verdict of death. By its inquiry, the court sought answers that Evidence Code section 1150 prohibits, i.e., "the effect of [any] statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." (Evid. Code, § 1150, subd. (a); see also *People v. Hutchinson*, *supra*, 71 Cal.2d at pp. 349-350.)

Moreover, even if it were admissible, the trial court's inquiry was cursory and ineffectual, consisting of only two questions to the panel as a whole. Only the jury foreperson answered. The trial court did not ask any questions individually of Juror Coley or any other juror. The manner in which the trial court framed the two questions it asked of the panel as a whole put the burden on any juror who disagreed with the foreperson's response to volunteer that disagreement and disown before the other jurors the verdict they had all just agreed to moments before.

FOOTNOTE 3. The majority also ignores the significant practical obstacles with which it has burdened defendant by requiring him at this late date to investigate and make the record that the trial court should have made. Because of the trial court's error,

defendant is faced with the difficult task of attempting to locate Juror Coley and the other jurors and persuading them to voluntarily assist a man whom they have sentenced to death in his efforts to overturn the verdict that they agreed to.

FOOTNOTE 4. Likewise, in *In re Mendes*, *supra*, 23 Cal.3d 847, 852, one of the cases the majority relies on, there was no evidence in the record as to the emotional state of a juror whose brother had died, but we presumed that "normal grief would make it exceedingly difficult for [the juror] to concentrate on the evidence, the arguments of counsel, the court's instructions and the jury's deliberations." (*Ibid.*) There is no reason not to presume the ordinary effects of "normal grief" operated in this case as well. Nor, contrary to the majority, did the record in *Mendes* contain any request by the juror to be excused. Instead, as here, the record did not contain the full exchange between the court and the juror and showed no request by the juror to be discharged. We only inferred such a request had occurred.

APPENDIX 2

[Filed February 28, 1997]

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RODNEY GENE BEELER,	) Case No. CV 96-0606-RT
Petitioner,	) **DEATH PENALTY CASE**
v.	) ORDER GRANTING
ARTHUR CALDERON, Warden of San Quentin State Prison,	) PETITIONER'S MOTION TO EXTEND FILING DATE FOR PETITION FOR WRIT OF HABEAS CORPUS AND TO EQUITABLY TOLL THE ONE-YEAR TIME PERIOD IN NEW 28 U.S.C. SECTION 2244(d), AND EXTENDING FILING DATE FOR PETITION FOR WRIT OF HABEAS CORPUS TO OCTOBER 13, 1997
Respondent.	)

Petitioner Rodney Gene Beeler's (petitioner's) motion to extend filing date for petition for writ of habeas corpus and equitably toll the one-year time period in new 28 U.S.C. section 2244(d) (motion) was submitted for decision. The court, the Honorable Robert J. Timlin, has read and considered the moving, opposing, reply papers and respondent's supplement to

its opposition. Based on such consideration, the court concludes as follows:

I.

FACTUAL BACKGROUND

On May 5, 1989, petitioner was sentenced to death by the Orange County Superior Court. The California Supreme Court affirmed petitioner's conviction and sentence of death on direct appeal on April 10, 1995. On November 15, 1995, the California Supreme Court denied petitioner's state petition for habeas corpus. On January 8, 1996, the United States Supreme Court denied his petition for a writ of certiorari.

On January 29, 1996, petitioner filed a pro per request for appointment of counsel and stay of execution with this court. On February 8, 1996, the court stayed petitioner's execution, and on May 22, 1996, appointed California Appellate Project attorneys' Karen Schryver and Scott Braden to represent petitioner. On September 19, 1996 and September 25, 1996, respectively, petitioner and respondent Arthur Calderon, the Warden of San Quentin State Prison (respondent) each filed their first status report. On September 27, 1996, following a status conference, this court ordered petitioner to file his petition on or before March 25, 1997.

On November 4, 1996, Scott Braden filed an ex parte application to withdraw as petitioner's counsel, based on his acceptance of out-of-state employment. On November 6, 1996, this court ordered Richard C. Neuhoff appointed, nunc pro tunc as of October 10, 1996, as second counsel for petitioner, and on November 11, 1996, it granted Scott Braden's application for leave to withdraw as counsel.

On February 3, 1997, petitioner filed the instant motion. According to the declarations of Karen Schryver and Richard Neuhoff, they have been unable to use

much of the work done by Mr. Braden in preparation for filing the petition for habeas corpus.[1] In addition, Ms. Schryver is primary counsel in two other pre-petition federal habeas proceedings, and is responsible for assisting counsel on numerous other state and federal capital cases, and Mr. Neuhoff has a preexisting obligation to prepare a portion of a brief on the merits in a case now before the United States Supreme Court, Lindh v. Murphy, Case No. 96-6298. That brief was due on February 21, 1997, and a reply brief is due on April 7, 1997, with oral argument likely to occur later in April 1997. Thus, while they have both spent time preparing to file the petition in this case, they have been unable to devote their full energies to such effort, and state that they will therefore be unable to file the petition on or before March 25, 1997. They therefore seek an extension of time, specifically 202 days, within which to file the petition, which would extend the filing date to October 13, 1997.

On February 11, 1997, respondent filed his opposition to the motion, contending that the time limitation imposed by Title 28 U.S.C. section 2244(d) as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (new section 2244) is a jurisdictional prerequisite to filing a federal petition for habeas corpus, that the time limitation, being jurisdictional rather than like a statute of limitation, is not subject to equitable tolling, and that in any event the requested 202 day extension is unreasonable and unwarranted.

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1. According to Ms. Schryver's declaration, Mr. Braden performed approximately 80 percent of the work on the case, while she was responsible for about 20 percent.

II.

ANALYSIS

A. Good Cause Appears to Grant the Request for an Extension of Time

Based on the declarations of Ms. Schryver and Mr. Neuhoff, the court concludes that an extension of time is necessary pursuant to principles of constitutional due process and the right to effective assistance of counsel to allow counsel time to prepare and file the petition for habeas corpus, and that an extension of 202 days is sufficient. Having concluded that an extension of time is necessary, the court considers whether it can properly grant such an extension of time within which to file the petition, respondent having urged that the time limitation in new section 2244(d) is jurisdictional, and not subject to extension.[2/]

B. The One-Year Period in New Section 2244(d) Is Not Jurisdictional. Instead, It Is the Equivalent of a Statute of Limitations.

Statutory filing deadlines are generally subject to the defenses of waiver, estoppel and equitable tolling, United States v. Locke, 471 U.S. 84, 94 n.10, 105 S.Ct. 1785, 1792 n.10, 85 L.Ed.2d 64 (1985), but such defenses do not apply if the filing period is jurisdictional. Valenzuela v. Kraft, Inc., 801 F.2d 1170,

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2. The court will assume, for the sake of argument, that new section 2244(d) is applicable to this case. It therefore will not address the issue whether, for purposes of the application of the holding in Jeffries v. Wood, 103 F.3d 827 (9th Cir. 1996) and Greenawalt v. Stewart, Nos. 88-1828, 88-1910, and 97-99000, 1997 WL 27116 (9th Cir. Jan. 17, 1997), petitioner's case was "pending" in the federal court upon his filing of his request for appointment of counsel, or whether a case is not pending until the filing of the petition for habeas corpus.

1172 (9th Cir. 1986), amended, 815 F.2d 570 (9th Cir. 1987).

Whether a filing deadline is jurisdictional or in the nature of a statute of limitations is determined by considering the language of the statute as well as the statutory scheme as a whole, the legislative history of the statute, and prior case law. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393-398, 102 S.Ct. 1127, 1132-1135, 71 L.Ed.2d 324 (1982) (Zipes).

Here, the one-year period provided in section 2244(d)[3] within which a petition must be filed is couched in terms of a limitation period only, and, like the statute in Zipes, does not "speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." 455 U.S. at 394, 102 S.Ct. at 1133. Furthermore, just as in Zipes, there is an entirely separate provision which does speak to the jurisdiction of the district courts, and that section, section 2241, does not limit jurisdiction to those cases in which there has been a timely filing in the district court. Zipes, 455 U.S. at 393-394, 102 S.Ct. at 1132-1133.

The legislative history, too shows no intent contrary to that expressed in the language of the statute itself. As to prior case law, there is none, this being a newly enacted section.

The court therefore concludes that the one-year time period of new section 2244(d) is not a jurisdictional prerequisite to filing a petition for habeas corpus, but is instead a limitation period.

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3. Section 2244(d) provides, in relevant part: "(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."

C. The Doctrine of Equitable Tolling Property May Be Applied to Extend the One-Year Limitation Period of New Section 2244(d)

Historically, federal courts have asserted equitable discretion to craft rules of tolling, laches, and waiver in the application of statutes of limitations. See, e.g., Bowen v. City of New York, 476 U.S. 467, 479, 106 S.Ct. 2022, 2029, 90 L.Ed.2d 462 (1986); Zipes, 455 U.S. 385, 398, 102 S.Ct. 1127, 1135, 71 L.Ed.2d 324; Burnett v. New York Central R. Co., 380 U.S. 424, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965). This discretion does not depend on whether or not the statutory scheme provides any or some guidance on the issue of tolling (other than a flat prohibition against it). See, e.g. Burnett v. New York Central R. Co., 380 U.S. at 434, 85 S.Ct. at 1058 (when none of the reasons on which the statute is founded can possibly apply, the federal courts have exercised equitable discretion to suspend the running of the limitations period in conformity with the "policy underlying [the] statute of limitations"); American Pipe & Construction Co. v. Utah, 414 U.S. 538, 559, 94 S.Ct. 756, 769, 38 L.Ed.2d 713 (1974) ("the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose"); Braun v. Sauerwein, 10 Wall. 218, 223 (1870) ("It seems, therefore, to be established, that the running of a statute of limitation may be suspended by causes not mentioned in the statute itself"). In fact, the judicial application of the doctrine of equitable tolling is so customary that the Supreme Court has stated that there is a "rebuttable presumption of equitable tolling" as to which "Congress, of course, may provide otherwise if it wishes to do so." Irwin v. Dept.

of Veterans Affairs, 498 U.S. 89, 96, 111 S.Ct. 453,457, 112 L.Ed.2d 435 (1990).[4]

Respondent contends that if Congress had wished to permit equitable considerations for an extension of

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4. Cf. U.S. v. Brockamp, No. 95-1225, ___ U.S. ___, 117 S.Ct. 849, ___, ___ L.Ed.2d ___ (97 Daily Journal D.A.R. 1613) (1997). In U.S. v. Brockamp, the court refused to apply the equitable tolling doctrine to section 6511 of the Internal Revenue Code of 1986 (which limits the time within which to make administrative claims for tax refunds) because (1) the section's time limitations are set forth in an "unusually emphatic form" and in a "highly detailed technical manner;" (2) the section reiterates its limitations several times in several different ways; (3) the section imposes substantive as well as procedural limitations by linking the amount of credit or refund recoverable to the time of filing; and (4) the section set forth very "specific" and "explicit" exceptions to its basic time limits (for refunds related to operating losses, credit carrybacks, foreign taxes, self-employment taxes, worthless securities, and bad debts), which exceptions did not include the grounds urged by the taxpayers as grounds for equitable tolling, i.e., senility or alcoholism. The court also noted that tax law is not normally characterized by case-specific exceptions reflecting individualized equities, and that the nature and potential magnitude of the administrative problems involved in allowing equitable tolling of the tax refund section suggested that Congress was unlikely to have intended to delegate to courts a generalized power to grant equitable tolling relief.

None of the factors which militated against applying the doctrine of equitable tolling in U.S. v. Brockamp exist here. New Section 2244's time limitation is not set forth in an unusually emphatic or highly detailed, technical manner. The time limitation is not reiterated several times in several ways, nor are any substantive limitations imposed. Although new section 2244(d)(2) provides that the time during which a properly filed application for state post-conviction or collateral review shall not be counted toward any period of limitation, this is not an exception to the basic time limit, but a description of a circumstance which would toll the running of the limitations period. Furthermore, criminal law, unlike tax law, is characterized by case-specific exceptions reflecting individual equities, and the potential magnitude of petitions for habeas relief in death penalty cases in which equitable tolling might be sought in no way approaches the potential magnitude of tax retired claims in which such relief might be sought.

the filing deadline on a case by case basis it could have so stated; hence, under the maxim *expressius [sic] unius est exclusio alterius*, this court should presume that, because Congress listed three specific occasions for tolling the filing period in section 154 of the statute, 28 U.S.C. section 2263(b), it did not intend that courts apply the equitable tolling doctrine to section 2254(d) on any other occasions. However, because there is a rebuttable presumption that the doctrine of equitable tolling applies to statutes of limitations unless Congress specifically provides otherwise, this court concludes that that presumption is not rebutted by a negative inference which may be drawn by applying the maxim, see Landgraf v. USI Film Products, 511 U.S. 244, __, 114 S.Ct. 1483, 1494-1495, 128 L.Ed.2d 229 (1994) (court declined to apply the maxim when the result would be to conclude that Congress made known its intent to abandon the general rule against prospective application of a statutory provision only by implication); Cott v. Ash, 422 U.S. 66, 82-83 n.14, 95 S.Ct. 2080, 2090 n.14, 45 L.Ed.2d 26 (1972) (declining to infer Congressional intent by applying the maxim because the court found "this excursion into extrapolation of legislative intent entirely unilluminating"), particularly when it requires applying the maxim to a different code section than that being interpreted.

Respondent also contends that applying the doctrine of equitable tolling to the limitation period in section 2254(d) would directly contradict the holding in Lonchar v. Thomas, ___ U.S. ___, 116 S.Ct. 1293, 134 L.Ed.2d 480 (1996). Not so.

In Lonchar v. Thomas, Lonchar had filed and then dismissed a state habeas petition. Shortly before Lonchar's scheduled execution, he filed another state habeas petition, which was denied. Upon its denial, he filed an "eleventh hour" federal habeas petition for the first time. The State of Georgia moved to dismiss the federal petition on the grounds of Lonchar's "inequitable conduct" in waiting almost six years, and

until the last minute, to file a federal petition. The district court held that Habeas Corpus Rule 9, not some generalized equitable authority to dismiss, governed the case, and hence Georgia's "inequitable conduct" ground could not form the basis for a dismissal. Furthermore, Rule 9's authority to dismiss for "abuse of the writ" applied only to second or successive petitions, not to a first petition. It therefore granted a stay of execution so that it could consider Georgia's other grounds for dismissal.

The next day, the Court of Appeals for the Eleventh Circuit vacated the stay, holding that equitable considerations independent of Rule 9 did apply, and then, "setting aside the Rules and traditional habeas doctrines," the Court of Appeals concluded that under the circumstances of Lonchar's case, Lonchar did not merit equitable relief. ___U.S. at ___, 116 S.Ct. at 1296.

The Supreme Court reversed, concluding that a federal court could not dismiss a valid first habeas petition for "equitable reasons," but instead only could dismiss habeas petitions for the reasons listed in federal statutes and Rules, or for reasons well-established in Supreme Court precedents, ___ U.S. ___, 116 S.Ct. at 1298-1303, because, although the writ of habeas corpus has been called an equitable remedy, "'courts of equity must be governed by rules and precedents no less than the courts of law.' [Citations.]" ___ U.S. at ___, 116 S.Ct. at 1298.

Clearly, nothing in Lonchar's holding precludes this court from concluding, after relying upon the language of new section 2244 and well-established precedent related to statutory interpretation, that the long-established doctrine of equitable tolling can be applied to toll the one-year limitation period of new section 2244; contrary to respondent's assertions, applying the doctrine of equitable toiling to the one-year limitation period is not at all "the type of ad hoc judicial exception-making expressly disapproved of in Lonchar."

The court therefore concludes that the doctrine of equitable tolling applies to the one-year limitation of new section 2244(d).

D. Under the Doctrine of Equitable Tolling, the Court Will Extend the Time Within Which to File a Petition for Habeas Corpus by 202 Days

Respondent "submits" that petitioner has failed to show a sufficient basis for tolling the statute. (Opposition, p. 23, n.7.) However, respondent does not support this submission with any argument or analysis.

In contrast, petitioner contends that he has demonstrated the existence of the four factors which justify application of equitable tolling: (1) due diligence in pursuing his claim; (2) notice to the other party of the pending claim such that it has had an opportunity to preserve appropriate evidence; (3) lack of prejudice to the other party by the passage of additional time; and (4) a result through the application of tolling which is consistent with the general remedial purpose of the statutory scheme under which relief is sought. Salgado v. Atlantic Richfield Co., 823 F.2d 1322, 1326 (9th Cir. 1987); Valenzuela v. Kraft, Inc., 801 F.2d at 1174-1175.

The court concludes that the circumstances of this case justify application of the equitable toiling doctrine. Due diligence in pursuing the claim is shown by the fact that petitioner' s counsel was appointed on March 22, 1996, and between that date and November 1, 1996, counsel with primary responsibility for the case read the reporter's and clerk's transcripts, reviewed appellate and trial counsel's files, and spent a significant amount of time on petitioner's case preparing to file a petition for habeas corpus. Respondent has sufficient notice of petitioner's claims, which to a great extent are stated in petitioner's specification of non-frivolous issues, as filed on May 16, 1996, so that it could preserve appropriate evidence. Further, there is no indication that respondent will be prejudiced if the statute is tolled by the 202

additional days requested by petitioner. Finally, applying the doctrine of equitable tolling when, as here, habeas counsel substitutes out after much of the time for preparing the petition has expired and without leaving much in the way of a finished work product, is consistent with the general remedial purpose of providing habeas petitioners subject to the death penalty with effective assistance of counsel in federal habeas corpus proceedings. McFarland v. Scott, 512 U.S. 849, ___, 114 S.Ct. 2572-2573, 129 L.Ed.2d 666 (1994).

Respondent also contends that any equitable tolling period has already begun to run, and will end on April 23, 1997. Respondent does not explain why such period will end on April 23,1997. The cases it cites without any explanation for this proposition. Block v. N.D. ex rel. Bd. of University & Sch. Lands, 461 U.S. 273, 286 n.23, 75 L.Ed.2d 840, 103 S.Ct. 1811, 1819 (1983); Texaco, Inc. v. Short, 454 U.S. 516, 527 n.21, 70 L.Ed.2d 738, 1023 S.Ct. 781. 791 (1982); Flowers v. Hanks, 941 F.Supp. 765, 771 (N.D.Ind. 1996), merely stand for the proposition that a newly enacted statute of limitations must allow a reasonable time after it takes effect for the commencement of suits upon existing causes of action. Such cases do not have anything to do with when or whether a period of limitations should be tolled for the reasons noted above.

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III.

DISPOSITION

(1) petitioner's motion to extend the filing date for filing his petition for habeas corpus is GRANTED; and

(2) the filing date for the petition for writ of habeas corpus is extended for 202 days from March 25, 1997 to October 13, 1997.

Dated: February 28, 1997

ROBERT J. TIMLIN
DISTRICT COURT JUDGE

APPENDIX 3

[Amended October 29, 1997]

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARTHUR CALDERON, Warden, California State Prison, San Quentin, Petitioner,	) No. 97-70277
v.	) DC No. CV-97-00606-RT
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, Respondents,	) ORDER AND AMENDED OPINION
RODNEY GENE BEELER, Real Party in Interest.	

Petition for Writ of Mandamus to the
United States District Court for the
Central District of California

Argued by Telephone Conference Call and
Submitted April 11, 1997

Filed April 17, 1997
Amended October 29, 1997
Before: Alex Kozinski, David R. Thompson
and Stephen S. Trott, Circuit Judges.
Opinion by Judge Kozinski

SUMMARY

Criminal Law & Procedure/Habeas Corpus

The court of appeals denied a petition for a writ of mandamus. The court held that equitable tolling applies to the one-year filing deadline for a habeas corpus petition under the Antiterrorism and Effective Death Penalty Act (AEDPA).

Real party in interest Rodney Beeler was convicted of murder and sentenced to death. After exhausting his state remedies, Beeler sought federal habeas corpus relief. The district court granted Beeler's request for appointment of counsel, naming attorneys Scott Braden and Karen Schryver to represent him. The court ordered Beeler to file his habeas petition by March 25, 1997.

Before Beeler's petition was complete, his attorneys asked the district court to extend the filing date and equitably toll AEDPA's one-year deadline for filing his petition. The reasons for the request were Braden's acceptance of employment in another state and Schryver's heavy workload of capital cases.

The district court found that Braden had been diligent in pursuing Beeler's petition, but that much of his work product was unusable by replacement counsel. Ruling that AEDPA's one-year deadline is a statute of limitations subject to equitable tolling, rather than a jurisdictional bar, the court granted Beeler's motion, extending the filing date to October 13, 1997. Petitioner Arthur Calderon, the Warden of California's San Quentin Prison, petitioned for a writ of mandamus.

Calderon contended that allowing AEDPA's one-year limit to be tolled would undermine the statute's

purpose to halt the unacceptable delay in the federal habeas process, and would be inconsistent with the statute's overall structure. He noted that § 107 -- which contains a parallel timing provision governing represented prisoners on state habeas corpus -- expressly provides for a 30-day tolling period, supporting the inference that Congress did not intend to allow § 101's limitation period to be tolled.

[1] Although a district court's interlocutory decisions are not generally reviewable, the court of appeals may entertain mandamus petitions in cases that present questions of law of major importance to the administration of the district courts. The court decides whether review is appropriate by weighing five factors: (1) whether the party seeking the writ has no other adequate means to attain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the district court's order is clearly erroneous; (4) whether the district court's order is an oft-repeated error or manifests persistent disregard for the federal rules; and (5) whether the district court's order raises new and important problems or issues of law of first impression.

[2] The first two factors militated in favor of reaching the question raised by Calderon. The essence of the state's claim was that it was entitled to go forward with Beeler's execution if he did not file a petition by AEDPA's anniversary date, April 23, 1997. This claim could not have been vindicated on direct appeal. The fifth factor was also satisfied. A large number of state prisoners were in Beeler's position, needing to file petitions quickly in order to comply with the AEDPA, but uncertain as to whether the statute's time limit could be extended. As no other circuit had decided the question, and the one-year anniversary of AEDPA's passage was approaching rapidly, the question

presented by Calderon's petition had to be answered as quickly as possible.

[3] AEDPA shortened the time for filing a federal habeas petition to one year. Section 101 provides that the limitations period runs from the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review. [4] Under this section, Beeler was required to file his habeas petition within one year of the date his process of direct review came to an end. If AEDPA's one-year limit were deemed to start prior to April 24, 1996, the date of the statute's enactment, Beeler's last chance to file a habeas petition would have expired on January 7, 1997, the date his certiorari petition was denied.

[5] Applying § 101's limitation in this fashion would have impermissibly attached new legal consequences to events completed before its enactment. State prisoners whose year had elapsed prior to AEDPA's enactment would have been barred from filing petitions that would have been timely under the old regime. Prisoners who had some days remaining before their year elapsed would have faced dire consequences for having wasted the time prior to AEDPA's enactment: they would have had to investigate, prepare, and file a petition in however much time remained -- as little as one day.

[6] AEDPA's one-year time limit did not begin to run against any state prisoner prior to the statute's date of enactment. No petition filed on or before April 23, 1997 -- one year from the date of AEDPA's enactment -- may be dismissed for failure to comply with § 101's time limit.

[7] The district court's interpretation of AEDPA's limitations period was not clearly erroneous. It was clearly correct. Section 101 is lucid. It is phrased only

as a period of limitation, and does not speak in jurisdictional terms or refer to the jurisdiction of the district courts. Nor does the jurisdictional provision of the habeas statute limit jurisdiction to cases in which there has been a timely filing in the district court. Timing provisions even more unyieldingly phrased than AEDPA's are statutes of limitation subject to tolling. [8] AEDPA's legislative history speaks with equal clarity.

[9] Statutes of limitation are presumptively subject to equitable tolling. Section 107's 30-day tolling limit was probably designed to cap what would otherwise have been an unlimited tolling period. Because § 101 contains no similar restriction, it could be inferred that Congress did not intend to upset the normal default rule allowing longer tolling periods. [10] Section 101's one-year timing provision is a statue of limitations subject to equitable tolling, not a jurisdictional bar.

COUNSEL

Patti W. Ranger, Deputy Attorney General, San Diego, California, for the petitioner.

Karen S. Schryver, California Appellate Project, San Francisco, California; Richard C. Neuhoff, San Francisco, California, for the real party in interest.

ORDER

The opinion filed April 17, 1997, is amended by deleting footnote 3 and replacing it with the following footnote:

AEDPA does apply in this case. AEDPA applied only to cases that were not pending

when it was enacted. *See Lindh* v. *Murphy*, 117 S. Ct. 2059 (1997). When AEDPA was enacted on April 24, 1996, Beeler had filed his request for appointment of counsel and stay of execution, but not his application for a writ of habeas corpus. Beeler argues that filing the request for appointment of counsel commenced his case, hence his case was pending on AEDPA's enactment date. *Brown* v. *Vasquez*, 952 F.2d 1164 (9th Cir. 1991), and *McFarland* v. *Scott*, 512 U.S. 849, 856-57 (1994), did hold that for certain purposes a habeas proceeding commences with the filing of such a request. However, those purposes were narrowly confined to the operation of 21 U.S.C. § 848(q)(4)(B), which provides for the appointment of counsel to capital defendants in post-conviction proceedings. Subsequent cases have noted the limits of *McFarland*. *See, e.g., Sterling* v. *Scott*, 57 F.3d 451, 456 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 715 (1996); *In re Parker*, 49 F.3d 204, 210 (6th Cir. 1995); *Steffen* v. *Tate*, 39 F.3d 622, 627 (6th Cir. 1994).

Here we don't face the same policy concern which drove *Brown* and *McFarland*; we are interpreting a different statute. Rule 11 of the Rules Governing § 2254 Cases says "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules." Filing an application for a writ is analogous to filing a complaint, which commences a civil case under Fed. R. Civ. P. 3.

Drawing this analogy to Fed. R. Civ. P. 3 is not inconsistent with the habeas rules. Applying AEDPA to petitioners such as Beeler

does put pressure on them to file their application within the limitation period, even if the state has not yet appointed counsel. However, that pressure is due to the working of AEDPA itself. The AEDPA limitations provisions treat the application for a writ, and only that, as commencing a case: Absent the equitable considerations present here, a prisoner must apply for a writ -- not just ask for a lawyer -- within the one year or six month limitations period. *See* AEDPA §§ 101, 107(a). A prisoner who had not requested counsel before April 24, 1996, would certainly have to apply for a writ within the limitations period. We merely hold that those provisions apply equally to prisoners who had requested counsel but not applied for a writ as of April 24, 1996. We conclude that, for purposes of determining cases to which AEDPA applies, a case is pending when the application for a writ of habeas corpus is filed. *Accord Holman* v. *Gilmore*, 1997 WL 564101 (7th Cir. Sept. 11, 1997).

The petition for rehearing is denied. The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote thereon. The suggestion for rehearing en banc is therefore rejected. Fed. R. App. P. 35(b).

OPINION

KOZINSKI, Circuit Judge.

We decide whether the one-year time limit for filing a petition for writ of habeas corpus, enacted in section 101 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), P.L. 104-132, 1996

U.S.C.C.A.N. (110 Stat.) 1214, 1217, is a statute of limitations subject to equitable tolling or an inflexible limitation on federal court jurisdiction.

I. Background

Real party in interest Rodney Gene Beeler was convicted of first-degree murder by a California jury and sentenced to death. He unsuccessfully pursued a direct appeal in the state courts, *see People* v. *Beeler,* 891 P.2d 153 (Cal. 1995), ending with the Supreme Court's denial of his petition for writ of certiorari on January 8, 1996. *See Beeler* v. *California*, 116 S.Ct. 723 (1996). Prior to that date, the California Supreme Court had also denied Beeler's petition for writ of habeas corpus. Having thus exhausted his state remedies, Beeler filed a pro se request for appointment of counsel and stay of execution in federal district court. The court granted Beeler's motion for a stay and appointed counsel, Scott Braden and Karen Schryver, to represent him. It also entered an order requiring Beeler to file his habeas petition by March 25, 1997.

Before Beeler's petition was prepared. Braden gave notice that he planned to take employment in Oklahoma and asked the district court for leave to withdraw. The district court granted Braden's request, and Schryver, who was already bogged down in a number of other capital cases, was promoted to lead counsel. Another lawyer, Richard Neuhoff, was appointed as second chair.

On February 3, 1997, Beeler's lawyers asked the district court to extend the filing date for his writ of habeas corpus and equitably toll AEDPA's one-year deadline for filing his petition. The district court granted Beeler's motion. It concluded that the time limit was not a jurisdictional bar but a statute of limitations subject to tolling, and gave Beeler until

October 13, 1997, to file his petition. Calderon, the warden of San Quentin, then filed a petition for writ of mandamus in this court, seeking review of the district court's decision.

II. Propriety of Mandamus Review

[1] Although a district court's interlocutory decisions are not generally reviewable, we are authorized to entertain petitions for writ of mandamus in cases that present "questions of law of major importance to the administration of the district courts." *State of Arizona* v. *United States Dist. Ct. (In re Cement Antitrust Litig.)*, 668 F.2d 1297, 1307 (9th Cir. 1982). We decide whether review by mandamus is appropriate by weighing the following five factors:

> (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief he desires;
>
> (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal;
>
> (3) whether the district court's order is clearly erroneous as a matter of law;
>
> (4) whether the district court's order is an oft repeated error or manifests persistent disregard for the federal rules; and
>
> (5) whether the district court's order raises new and important problems or issues of law of first impression.

Calderon v. *United States Dist. Ct.*, 98 F.3d 1102, 1105 (9th Cir. 1996) (citing *Bauman* v. *United States Dist. Ct.*, 557 F.2d 650, 654-55 (9th Cir. 1977), *aff'd* 459 U.S. 1191

(1983)), *petition for cert. filed*, ___ U.S.L.W. ___, (Mar. 17, 1997) (No. 96-8402).

[2] Here, the first two *Bauman* factors militate in favor of reaching the question raised by Calderon's petition. The essence of the state's claim is that it is entitled to go forward with Beeler's execution if he does not file a petition by AEDPA's anniversary date, April 23, 1997. By its nature, this claim cannot be vindicated on direct appeal from a final judgment, which would take place long after that date. The fifth *Bauman* factor is also satisfied here. A large number of state prisoners are in Beeler's position, needing to file petitions quickly in order to comply with the Act, but uncertain as to whether AEDPA's time-limit can be extended. As no other circuit has yet decided this question, and we are rapidly approaching the one-year anniversary of AEDPA's passage, the question presented by Calderon's petition must be answered as promptly as possible. We therefore turn to the merits of the petition.

III. Mechanics of the Time Limit

[3] Prior to AEDPA's enactment, state prisoners had almost unfettered discretion in deciding when to file a federal habeas petition.[1] Even delays of more than a decade did not necessarily bar a prisoner from seeking relief. *E.g., Lonchar* v. *Thomas*, 116 S.Ct. 1293, 1295 (1996). AEDPA dramatically changed this landscape,

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1. The only pre-AEDPA time limit on filing habeas petitions was imposed by Rule 9(a) of the Rules Governing Section 2254 Cases in the United States District Courts, which allowed a district court to dismiss a petition if "it appears that the state . . . has been prejudiced in its ability to respond to the petition by delay in filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred."

shortening the time for filing a federal habeas petition to one year. Section 101 of AEDPA amended 28 U.S.C. § 2244 by adding the following provision:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --
>
> (A) the date on which the judgment became final by conclusion of direct review or the expiration of the time seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim of claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

[4] Under this section, Beeler is required to file his habeas petition within one year of the date his process of direct review came to an end. The Supreme Court denied his petition for writ of certiorari on January 8, 1996, so if AEDPA's one-year limit were deemed to start prior to April 24, 1996, the date of the statute's enactment, Beeler's last chance to file a habeas petition would have expired on January 7, 1997.[2]

[5] But applying section 101's limitation period in this fashion would impermissibly "attach[] new legal consequences to events completed before its enactment." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 270 (1994). Those state prisoners whose year had elapsed prior to AEDPA's enactment would be altogether barred from filing petitions that would have been timely under the old regime. Those prisoners who had some days remaining before their year elapsed would face dire consequences for having wasted the time prior to AEDPA's enactment: They would have to investigate, prepare and file a petition in however much time remained -- perhaps as little as one day.

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2. We assume Beeler's year began to run on the date his petition for certiorari was denied only because the precise date does not affect the outcome of this case. Section 101 does not, in fact, start a prisoner's one-year clock running until "the date on which the judgment became final by conclusion of direct review." While the Supreme Court's denial of a certiorari petition does generally mark the end of direct review, this date is not necessarily the date the judgment becomes final. In federal court, for example, a judgment does not become final following appeal until the case is returned to district court and the mandate is spread. *See* 16A Charles Alan Wright et al., *Federal Practice and Procedure* § 3987, at 687 n.2 (2d ed. 1996) ("Issuance of the appellate mandate returns the case to the district court.") Assuming that similar procedures prevail in the state courts, the date of final judgment may not be the same as the date certiorari is denied. We express no opinion as to which of these dates triggers section 101's time-limit.

[6] We therefore conclude -- along with the Second and Seventh Circuits -- that AEDPA's one-year time limit did not begin to run against any state prisoner prior to the statute's date of enactment. *See Reyes* v. *Keane*, 90 F.3d 676, 679 (2d Cir. 1996) (allowing AEDPA's time limit to run from date prior to enactment "would be entirely unfair and a severe instance of retroactivity"); *Lindh* v. *Murphy*, 96 F.3d 856, 866 (7th Cir. 1996) (en banc) ("Courts treat a reduction in the statute of limitations as a rule for new cases only."), *cert. granted*, 117 S.Ct. 726 (1997); *see also United States* v. *Lopez*, 100 F.3d 113, 116-17 (10th Cir. 1996) (rejecting retroactive application of parallel one-year limit for filing of federal petitions under 28 U.S.C. § 2255). No petition filed on or before April 23, 1997 -- one year from the date of AEDPA's enactment -- may be dismissed for failure to comply with the section 101's time limit. *See Texaco, Inc.* v. *Short*, 454 U.S. 516, 527 n.21 (1982) (new statutes of limitation must allow "a reasonable time after they take effect for the commencement of suits upon existing causes of action" (quoting *Wilson* v. *Iseminger*, 185 U.S. 55, 62 (1902))); *Lindh*, 96 F.3d at 866 (AEDPA's time limit is "short enough that the 'reasonable time' after April 24, 1996, and the one-year statutory period coalesce").[3]

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3. AEDPA does apply in this case. AEDPA applies only to cases that were not pending when it was enacted. *See Lindh* v. *Murphy*, 117 S.Ct. 2059 (1997). When AEDPA was enacted on April 24, 1996, Beeler had filed his request for appointment of counsel and stay of execution, but not his application for a writ of habeas corpus. Beeler argues that filing the request for appointment of counsel commenced his case, hence his case was pending on AEDPA's enactment date. *Brown* v. *Vasquez* 952 F.2d 1164 (9th Cir. 1991), and *McFarland* v. *Scott*, 512 U.S. 849, 856-57 (1994), did hold that for certain purposes a habeas proceeding commences with the filing of such a request. However, those purposes were narrowly confined to the operation of 21 U.S.C. § 848(q)(4)(B), which provides for the appointment of counsel to capital defendants in post-conviction proceedings. Subsequent cases have noted the limits of *McFarland*. *See, e.g.,*

IV. Can the One-Year Limit Be Tolled?

Beeler, along with many other prisoners, thus has at least until April 23, 1997, to file his habeas petition. The district court went one step farther and, based on its conclusion that AEDPA's one-year limit could be equitably tolled, extended Beeler's deadline to October 17, 1997. We will upset this decision on petition for writ of mandamus only if the district court's decision was "clearly erroneous as a matter of law." *Bauman*, 557 F.2d at 654-55.

Sterling v. *Scott*, 57 F.3d 451, 456 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 715 (1996); *In re Parker*, 49 F.3d 204, 210 (6th Cir. 1995); *Steffen* v. *Tate*, 39 F.3d 622, 627 (6th Cir. 1994).

Here we don't face the same policy concern which drove *Brown* and *McFarland*; we are interpreting a different statute. Rule 11 of the Rules Governing § 2254 Cases says "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules." Filing an application for a writ is analogous to filing a complaint, which commences a civil case under Fed. R. Civ. P. 3.

Drawing this analogy to Fed. R. Civ. P. 3 is not inconsistent with the habeas rules. Applying AEDPA to petitioners such as Beeler does put pressure on them to file their application within the limitation period, even if the state has not yet appointed counsel. However, that pressure is due to the working of AEDPA itself. The AEDPA limitations provisions treat the application for a writ, and only that, as commencing a case: Absent the equitable considerations present here, a prisoner must apply for a writ -- not just ask for a lawyer -- within the one year of six month limitations period. *See* AEDPA §§ 101, 107(a). A prisoner who had not requested counsel before April 24, 1996, would certainly have to apply for a writ within the limitations period. We merely hold that those provisions apply equally to prisoners who had requested counsel but not applied for a writ as of April 24, 1996. We conclude that, for purposes of determining cases to which AEDPA applies, a case is pending when the application for a writ of habeas corpus is filed. *Accord Holman* v. *Gilmore*, 1997 WL 564101 (7th Cir. Sept. 11, 1997).

[7] The district court's interpretation of AEDPA's limitation period was not, however, clearly erroneous. It was, rather, clearly correct. Unlike other parts of AEDPA, section 101 is remarkably lucid. It is phrased only as a "period of limitation," and "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982). Nor does the jurisdictional provision of the habeas statute, 28 U.S.C. § 2241, "limit jurisdiction to those cases in which there has been a timely filing" in the district court. *Zipes*, 455 U.S. at 393. Indeed, both the Supreme Court and this court have repeatedly held that timing provisions even more unyieldingly phrased than AEDPA's are statutes of limitations subject to tolling. *See, e.g., Burnett* v. *New York Cent. R.R.*, 380 U.S. 424, 426 (1965) ("[N]o action shall be maintained . . . unless commenced within three years of the day the cause of action accrued."); *William G. Tadlock Const.* v. *United States Dept. of Defense*, 91 F.3d 1335, 1340 (9th Cir. 1996) ("[C]omplaint may not be filed more than 180 days after the later of the date on which the violation is alleged to have occurred or was discovered.").[4]

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4. *United States* v. *Brockamp*, 117 S.Ct. 849 (1997), is not to the contrary. In *Brockamp*, the Court held that a time-limit on filing tax refund claims was a jurisdictional bar, not a tollable statute of limitations. The statute at issue there was, however, phrased in "a highly detailed technical manner, that linguistically speaking, cannot easily be read as containing implicit exceptions." *Id.* at 851. AEDPA's one-year limit is neither detailed nor technical; it reads like an everyday, run-of-the-mill statute of limitations. Moreover, *Brockamp* also relied heavily on the fact that in administering a tax system, it is sometimes necessary "to pay the price of occasional unfairness in individual cases . . . in order to maintain a more workable" regime. *Id.* at 852. While such "occasional" injustices may be a necessary price of tax administration, they are decidedly not an acceptable cost of doing business in death penalty cases.

[8] AEDPA's legislative history, were it necessary to consult it, speaks with equally resounding clarity. Neither the conference report, *see* H.R. Conf. Rep. 104-518, at 111 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944, nor any statements of individual House or Senate members, describe the one-year limitation as a restriction on federal court jurisdiction. Many members of Congress -- including AEDPA's authors in the Senate and its sponsors in the House -- did however, describe section 101 as a "statute of limitations." *See, e.g.,* 142 Cong. Rec. S3472 (daily ed. Apr. 17, 1996) (statement of Sen. Spector) (AEDPA designed to "impose a statute of limitations on the filing of habeas corpus petitions"); 141 Cong. Rec. S7805 (daily ed. June 7, 1995) (statement of Sen. Hatch) (under current law, there is no "statute of limitations" on filing habeas petitions); 142 Cong. Rec. H3606 (daily ed. Apr. 18, 1996) (statement of Rep. Hyde) ("Now, we have a 1-year statute of limitations in habeas."); 141 Cong. Rec. S7838 (daily ed. June 7, 1995) (statement of Sen. Cohen) ("I support a statute of limitations for filing habeas petitions."); *id.* at S7840 (statement of Sen. Biden) ("I agree with my Republican colleagues from Utah and Pennsylvania that we ought to have a strict statute of limitations and a strict limit on successive petitions.").

Calderon nevertheless argues that allowing the one-year limit to be tolled will undermine the statute's purpose "to halt the unacceptable delay which has developed in the federal habeas process." Petition for Writ of Mandamus, at 12. A one-year statute of limitations will, however, serve this goal quite well; not as well as a strict jurisdictional bar to be sure, but section 101's time-limit will doubtless speed up the habeas process considerably. Equitable tolling will not be available in most cases, as extensions of time will only be granted if "extraordinary circumstances" beyond a prisoner's control make it impossible to file a petition on time. *Alvarez-Machain* v. *United States,* 107 F.3d 696,

701 (9th Cir. 1997). We have no doubt that district judges will take seriously Congress's desire to accelerate the federal habeas process, and will only authorize extensions when this high hurdle is surmounted.

Calderon also claims that interpreting section 101 as a tollable statute of limitations is inconsistent with the Act's overall structure. This claim is based on the observation that section 107 of the Act -- which contains a parallel timing provision governing prisoners represented by competent counsel on state habeas -- expressly provides for a 30-day tolling period.[5] So the argument goes, we can infer from the existence of section 107's tolling provision that Congress must not have intended to allow section 101's limitation period to be tolled.

[9] The Supreme Court has cautioned against using this kind of negative inferential reasoning, because such "excursion[s] into extrapolation of legislative intent" are most often "entirely unilluminating." *Cort* v. *Ash*, 422 U.S. 66, 83 n.14 (1975). Indeed, the more reasonable inference to be drawn from Congress's inclusion of a 30-day tolling limit in section 107 runs contrary to that proffered by Calderon. Statutes of limitations are presumptively subject to equitable tolling. *See Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) ("[T]he same rebuttable presumption of equitable tolling applicable to suits against private defendants should also

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5. Section 107's timing provision provides:

> The time requirements established [for capital cases from opt-in states] shall be tolled . . . during an additional period not to exceed 30 days, if . . . a showing of good cause is made for failure to file the habeas corpus application within the time period established by this section."

28 U.S.C. § 2263(b)(3)(B).

apply to suits against the United States."); *United States* v. *Locke*, 471 U.S. 84, 94 n.10 (1985) ("Statutory filing deadlines are generally subject to the defenses of waiver, estoppel, and equitable tolling."). Section 107's 30-day tolling limit was therefore probably designed to cap what would have otherwise been an unlimited tolling period. Because section 101 contains no similar restriction, we can infer that Congress did not intend to upset the normal default rule allowing longer tolling periods.

[10] Every relevant signal -- from the Act's plain language, to its legislative history, to its structure -- points in the same direction: Section 101's one-year timing provision is a statute of limitations subject to equitable tolling, not a jurisdictional bar.

V. The District Court's Decision To Toll

Having decided that section 101's time-limit can be tolled, we have no basis for upsetting the district court's decision to allow Beeler more time to file his petition. The district court found that Beeler's lead counsel, Scott Braden, had diligently pursued the preparation of Beeler's petition. Braden, however, withdrew after accepting employment in another state, and much of the work product he left behind was not usable by replacement counsel -- a turn of events over which Beeler had no control. There were thus "extraordinary circumstances" which justified tolling section 101's statute of limitations. *Alvarez-Machain*, 107 F.3d at 701.

Petition for writ of mandamus **DENIED.**

APPENDIX 4

[Filed June 23, 1997]

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

June 23, 1997

Ms. Patti W. Ranger
Deputy Attorney General
P.O. Box 85266
San Diego, CA 92101

Re: In Re Arthur Calderon, Warden
No. 96-1683

Dear Ms. Ranger:

The Court today entered the following order in the above entitled case:

The motion of respondent for leave to proceed in forma pauperis is denied. The petition for a writ of mandamus is denied.

Sincerely,

William K. Suter, Clerk

No. 97-0953

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, California State Prison at San Quentin, Petitioner

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, Respondent

RODNEY G. BEELER, Real Party in Interest

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REAL PARTY IN INTEREST'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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24 pp

REAL PARTY IN INTEREST'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In this case, the Ninth Circuit Court of Appeals -- in a decision written by Judge Alex Kozinski and joined by Judges Stephen S. Trott and David R. Thompson -- held that the one-year period of limitation in newly enacted 28 U.S.C. § 2244(d) is subject to equitable tolling. Calderon v. U.S. District Court, 128 F.3d 1283, 1997 WL 709900 (9th Cir. 1997), mandamus denied sub nom. In re Arthur Calderon, 138 L.Ed.2d 1004.[1] There is nothing worthy of certiorari about this holding. Not only did the Court of Appeals construe section 2244(d) as embodying the same equitable principle that statutes of limitation have "customarily" and "presumptively" been construed to embody,[2] but the Court's conclusion was supported by "[e]very relevant signal -- from the Act's plain language, to its legislative history, to its structure." 1997 WL 109900 *5, App.3 at A132.

Nevertheless, petitioner Calderon insists that section 2244(d)'s one-year period of limitation be given an illogical and extremist reading, one that is certain to produce injustices of the gravest sort. For, under Calderon's "absolute"

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[1] When referring hereafter to the Ninth Circuit's amended opinion below, this brief will use the WestLaw citation and the page citation within Appendix 3 of petitioner Calderon's certiorari petition. Although the opinion below will be reported at 128 F.3d 1283, the volume of the Federal Reporter containing the opinion has not yet been issued, and thus no official page citations to internal pages of the opinion are currently available.

[2] See, e.g., cases collected post, n.5 and accompanying text.

interpretation (Pet. 9 & 13), the one-year period would be immutably fixed for all cases and for all purposes, no matter how compelling the reason justifying a longer time. If counsel cannot be found for a capital prisoner within one year, or if counsel is appointed with insufficient time to meaningfully prepare, or if counsel dies or becomes sick or quits or is disbarred, or if counsel's office is destroyed in an earthquake or a fire, it is the prisoner who suffers; he will have no federal habeas corpus review and can be executed forthwith, regardless of the unconstitutionality of the judgment against him.

Similarly, since the one-year period of limitation applies to non-capital as well as capital prisoners, an uncounseled non-capital prisoner could, under petitioner Calderon's interpretation, be denied habeas review simply because he or she failed to tender a timely in forma pauperis motion with the habeas petition, or because the petition contained some other easily remediable technical deficiency or was late because it had been tossed into the trash by a rogue prison official.

In petitioner Calderon's view, the consequences of any and all such acts of God, third-party malfeasances, and technical shortcomings are to be visited upon the prisoner, regardless of the prisoner's lack of fault or inability to prevent them.

Suffice it to say, nothing in the language or legislative history of section 2244(d) supports Calderon's argument. To the contrary, as Judge Kozinski pointed out, "[e]very relevant signal" points the other way, i.e., to the conclusion that the

one-year timing provision is "a statute of limitations subject to equitable tolling, not a jurisdictional bar." 1997 WL 70900 *5, App.3 at A132.

Thus, the present petition for writ of certiorari has utterly no merit. The challenged holding of the Court of Appeals, like that of the District Court before it, was "clearly correct"[3] and presents no question meriting this Court's intervention. See Section II, post. Certiorari is also inapprcpriate for two additional reasons.

First, the certiorari petition should be denied as an abusive, successive filing. Petitioner Calderon has previously sought to persuade this Court to review the exact same issue in the exact same case; having had one such full opportunity, petitioner should not be given another.

Second, this case is inappropriate for certiorari review because, prior to the date on which (in petitioner Calderon's view) section 2244(d)'s one-year limitation period expired, real party in interest Beeler was specifically authorized by both the District Court and the Court of Appeals to file his habeas petition at a later date, and this Court declined to review those decisions both before and after the alleged statutory deadline. Real party justifiably relied upon those court rulings in filing his petition on October 10, 1997.

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[3] 1997 WL 709900 *4, App.3 at A129.

I. CASE BACKGROUND

On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter, the "AEDPA" or the "Act"). The Act made essentially two sets of changes to federal habeas corpus proceedings. First, it amended several provisions of the pre-existing habeas corpus statutes, i.e., those in Chapter 153 of Title 28 of the United States Code. Second, it added an entirely new chapter to Title 28 -- Chapter 154 -- containing new provisions that apply only to capital habeas cases arising out of states that opted to satisfy certain pre-conditions. The limitations statute at issue in the present case -- 28 U.S.C. § 2244(d) -- was one of the AEDPA's revisions to Chapter 153; petitioner Calderon has conceded the "Chapter 154" or "opt-in" revisions do not apply to Mr. Beeler's case. (Pet 6 n.2.)

The Court of Appeals has accurately characterized the relevant factual background of the case. 1997 WL 709900 *1 & *6, App.3 at A122-A123, A132. However, in light of omissions and mischaracterizations in the certiorari petition, real party needs to clarify several matters at the outset.

First: the attorney who withdrew as counsel for Mr. Beeler in the District Court was not merely "one of [Beeler's] originally appointed counsel," as petitioner Calderon asserts (Pet. 5, 12), but was Beeler's primary counsel and had performed about 80 percent of the work on the case. The other attorney (Ms. Schryver) was already lead counsel in two other federal capital cases in which habeas petitions had not yet been filed,

and she was also responsible for assisting lawyers in numerous other state and federal capital cases; thus, her role in Mr. Beeler's case was limited to serving as "back up" for lead counsel. See Schryver Decl. (Pet. Supp. Ex. submitted to 9th Cir. 3/27/97) at 1-2, ¶ 2.

Second: upon learning of primary counsel's decision to leave, Ms. Schryver began an immediate search to find another lawyer to serve as second counsel, while she herself -- although "already bogged down in a number of other capital cases" (1997 WL 709900 at *1, App.3 at A122) -- was assigned by her office to take over former counsel's role as Mr. Beeler's primary attorney. It was only later, after finding that "much of the work product [that former lead counsel] left behind was not usable" (1997 WL 709900 at *6, App.3 at A132), that counsel for real party requested the extension of time and equitable tolling.

Third: Contrary to petitioner Calderon's representation, there was nothing "bare bones" about the petition that Mr. Beeler was ordered to and did file in this case. See Pet. 12. It is true that the District Court did not order Beeler to file a memorandum of points and authorities with the petition, but such a memorandum is not called for by the Habeas Rules or by the Local Rules, and the "fact pleading" petition that Mr. Beeler did file in accordance with federal law was 97 pages long.[4]

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[4] One additional factual mischaracterization from the certiorari petition is appropriately mentioned here. When the District Court granted Mr. Beeler until October 13, 1997 to file his habeas petition, it effectively granted equitable tolling for five and one-half months past the one-year statute of limitations (continued...)

II. THE COURT OF APPEALS WAS CLEARLY CORRECT IN CONCLUDING THAT A DISTRICT COURT MAY EQUITABLY TOLL THE ONE-YEAR PERIOD OF LIMITATION SET FORTH IN 28 U.S.C. § 2244(d).

The Court of Appeals' conclusion that section 2244(d)'s one-year filing period may be equitably tolled was plainly correct. The language of new section 2244(d) itself, the governing case law, and the historical context all make this crystal clear, and the Court of Appeal's analysis of these matters was so obviously right that petitioner Calderon does not even address it. Indeed, if anything, the Court of Appeals understated both the case in favor of its holding and the problems with Calderon's arguments.

A. Petitioner Calderon Does Not Contest Most Of The Court Of Appeals' Analysis.

Neither in the current petition nor in the petition for writ of mandate that petitioner Calderon submitted to this Court in this same case in April 1997 has petitioner addressed, let alone rebutted, the bulk of the Court of Appeals' reasoning. Among the uncontested points are the following:

1. "Statutes of limitations are presumptively subject to equitable tolling." 1997 WL 709900 at *5, App.3 at A131, citing Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95-96

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[4](...continued)
date (April 23, 1997), not for seven months, as petitioner Calderon indicates. Pet. 12:8-9.

Additional mischaracterizations of fact and law are set forth in the remainder of this Opposition, especially in Section III.C.

(1990), and United States v. Locke, 471 U.S. 84, 94 n.10 (1985).[5]

2. Newly enacted section 2244(d) "reads like an everyday, run-of-the-mill statute of limitations." 1997 WL 709900 at *6 n.4, App.3 at A129 n.4.

3. Newly enacted section 2244(d) "is phrased only as a 'period of limitation,' and 'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.' Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394 (1982). Nor does the jurisdictional provision of the habeas statute, 28 U.S.C. § 2241, 'limit jurisdiction to those cases in which there has been a timely filing' in the district court. Zipes, 455 U.S. at 393." 1997 WL 709900 at *4, App.3 at A129.[6]

4. "[B]oth the Supreme Court and this court have repeatedly held that timing provisions even more unyieldingly phrased than AEDPA's are statutes of limitations subject to tolling. See,

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[5] United States v. Locke, 471 U.S. 84, 94 n. 10 (1985) ("Statutory filing deadlines are generally subject to defenses of waiver, estoppel and equitable tolling."); Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95 (1990) ("Time requirements in law suits ... are customarily subject to equitable tolling.") (internal quotation omitted). Among the additional cases the Court of Appeals could have cited are Lampf v. Gilbertson, 501 U.S. 350, 363 (1991) (same); Bowen v. City of New York, 476 U.S. 467, 479 (1986) (finding "'a traditional equitable tolling principle'" in statutes of limitation) (quoting Honda v. Clark, 386 U.S. 484, 501 (1967)); Braun v. Sauerwien, 10 Wall. 218, 223 (1870) ("It seems, therefore, to be established, that the running of a statute of limitation may be suspended by causes not mentioned in the statute itself").

[6] Real party notes that these considerations are the bases upon which this Court found that equitable tolling was authorized by statute in Zipes, one of the decisions cited by the Court of Appeals that petitioner Calderon has chosen to ignore.

e.g., Burnett v. New York Cent. R.R., 380 U.S. 424, 426, 85 S. Ct. 1050, 13 L. Ed. 2d 941 (1965) ("[N]o action shall be maintained ... unless commenced within three years from the day the cause of action accrued"); William G. Tadlock Const. v. United States Dept. of Defense, 91 F.3d 1335, 1340 (9th Cir. 1996) ('[C]omplaint may not be filed more than 180 days after the later of the date on which the violation is alleged to have occurred or was discovered.')" 1997 WL 709900 at *4, App.3 at A129.[7]

5. "AEDPA's legislative history, were it necessary to consult it, speaks with equally resounding clarity. Neither the conference report, see H.R. Conf. Rep. 104-518, at 111 (1996), reprinted in 1996 U.S.C.C.A.N. 944, nor any statements of individual House or Senate members, describe the one-year limitation as a restriction on federal court jurisdiction. Many members of Congress -- including AEDPA's authors in the Senate and its sponsors in the House -- did, however, describe section 101 as a 'statute of limitations.'" 1997 WL 709900 at *4, App.3 at A130.[8]

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[7] The Court of Appeals could also have pointed to such additional decisions as American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974) ("Any action to enforce any cause of action [under the antitrust laws] shall be commenced within four years after the cause of action accrued") and Irwin v. Dept. of Veterans Affairs, 498 U.S. 89, 95 (1990) ("Every claim ... shall be barred unless the petition ... is filed ... within six years") (dictum).

[8] Real party would add that in Zipes, this Court found that legislative authorization for equitable tolling was supported by the fact that one Senator had characterized the statutory limitation period at issue in that case as a "period of

(continued...)

Not only has petitioner Calderon not addressed the matters just listed, but none of the cases cited above is mentioned in the certiorari petition. Not a single one.

B. Petitioner Calderon's Interpretation of Newly Enacted Section 2244(d) Would Render The AEDPA Internally Inconsistent.

Petitioner Calderon's assertion that section 2244(d) embodies an "inflexible limitation on federal court jurisdiction" (1997 WL 709900 at *1, App.3 at A122) is even more implausible than the Court of Appeals' opinion indicates, because such an interpretation would render habeas law -- and Congress' actions in enacting the AEDPA -- internally inconsistent.

In enacting the AEDPA, Congress reaffirmed a capital habeas petitioner's federal right to counsel. Legislators debating the habeas amendments deemed the right to counsel established in 21 U.S.C. § 848(q)(4)(B) to be an integral part of the system of federal habeas review, and the right was reaffirmed in the Act itself.[9] These events are especially significant in light of the background against which they arose.

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[8](...continued)
limitation" and another Senator had described the purpose of the provision as preventing the pressing of "stale" claims. Zipes, 455 U.S. at 394, citing 110 Cong. Rec. 12723 & 7243 (1964). In the present case, as the Court of Appeals made clear, the Congressional Record concerning section 2244(d) contains the same kinds of characterizations, except that here they are more numerous. Moreover, the fact that section 2244(d) used the "period of limitation" phrase that Zipes had indicated supported a finding of equitable tolling is yet further evidence that that statute embodied that doctrine.

[9] See, e.g., 141 Cong. Rec. S7813 (remarks of Sen. Hatch), S7814 (Sen. Specter) (June 7, 1995). See also AEDPA § 104(h), enacting 28 U.S.C. 6 2254(h), which is discussed below.

Not long before the AEDPA was passed, this Court had ruled that "Congress' provision of a right to counsel under § 848(q)(4)(B) reflects a determination that quality legal representation is necessary in capital habeas corpus proceedings in light of 'the seriousness of the possible penalty and the unique and complex nature of the litigation'" and that this right to counsel "necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims." McFarland v. Scott, 512 U.S. 849, 114 S. Ct. 2568, 2572, 129 L.Ed.2d 666 (1994) (quoting 21 U.S.C. § 848(q)(7)); id. 114 S.Ct. at 2573; emphases added. Given this backdrop, it is particularly significant that, during the process of enacting the AEDPA, Congress specifically rejected a proposed amendment to section 848(q) that would have eliminated the right to counsel in capital cases and would instead have made appointment of counsel entirely discretionary. See 141 Cong. Rec. S7812-17 (June 7, 1995). Indeed, Congress went further and expressly reaffirmed the statutory provisions that had been recently interpreted in McFarland.[10]

Congress' actions with respect to a capital habeas petitioner's right to counsel not only shows its continuing

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[10] See AEDPA § 104(d), enacting 28 U.S.C. § 2254(h) (the right to counsel in federal habeas cases is discretionary "[e]xcept as provided in section 408 of the Controlled Substances Act [21 U.S.C. § 848(q)]").

"Technical amendments" were made to section 848(q) by sections 108 and 901 of the 1996 Act, but these amendments did not alter a capital petitioner's right to counsel in federal habeas proceedings.

intent to provide capital habeas petitioners with counsel -- indeed, with counsel who are (in the words of McFarland) able "meaningfully to research and present a defendant's habeas claims" -- but it also undermines petitioner Calderon's claim that section 2244(d) is an absolute and inflexible jurisdictional prerequisite to filing. For, under Calderon's view, section 2244(d) would effectively do away with the right to counsel if no attorney can be found within a year's time, or if counsel is found at a time where there is insufficient opportunity "meaningfully to research and present a defendant's habeas claims." Such a repeal by implication would be extremely doubtful in any case, but here -- where Congress specifically rejected an attempt to water down the right to counsel in capital cases, where its members extolled the importance of the assistance of counsel and insisted they were preserving the basic role of habeas corpus as a forum for protection of fundamental rights,[11] and where Congress explicitly left intact a statute interpreted by this Court to require the "meaningful" assistance of counsel -- such a repeal is inconceivable.

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[11] Throughout the debate over the 1996 Act, members of Congress emphasized that the habeas amendments were intended to preserve fairness to the habeas petitioner and the integrity of federal court review of state convictions. See, e.g., 141 Cong. Rec. S7814 & S7834 (1995) (Sen. Specter), id. at S7835 (Sen. Biden), id., at S7813 (Sen. Hatch).

III. PETITIONER CALDERON'S CURRENT ARGUMENTS ARE MERITLESS, IRRELEVANT, AND INACCURATE.

Instead of addressing the reasoning of the Court of Appeals or any of the relevant case law or other points discussed above, petitioner Calderon presents this Court with a mishmash of new and recycled arguments. Calderon's primary argument is a rather obvious effort to convince the Court of the supposed need to (in effect) enact the policies Calderon wishes Congress had imposed in section 2244(d). (Pet. 7-14.) Calderon also offers a few statutory interpretation arguments. (Pet. 14-19.) Because only the latter arguments are actually relevant to the issue before the Court, real party will address them first. (Post, Sections III.A & III.B.) Thereafter, real party will discuss petitioner's alleged policy arguments. (Post, Section III.C.)

A. Petitioner Calderon Erroneously Claims That The Language Of Section 2244(d) Reveals Congress' Intent That The One-Year Period Be "Jurisdictional In Nature."

Petitioner Calderon's first statutory argument is that the language of section 2244(d) is "precise" and "detail[ed]" and that therefore the statute must be jurisdictional and not subject to equitable tolling. (Pet. 14-15.) However, "precise and detailed" would describe most statutes of limitations, and Calderon does not even try to contest the Court of Appeals' conclusion that section 2244(d) "reads like an everyday, run-of-the-mill statute of limitations." 1997 WL 709900 at *6 n.4, App.3 at A129 n.4. Calderon's silence is particularly significant because, of course, "everyday, run-of-the-mill

statutes of limitations" customarily and presumptively embody equitable tolling. See ante at n.5 & accompanying text.[12]

Nor, contrary to petitioner Calderon's assertion, does the supposed fact that section 2244(d) "provid[es] only one specified way of extending the one-year filing period" (Pet. 14) show that the statute is jurisdictional. The courts have repeatedly refused to infer that a statutory listing of some tolling provisions establishes a legislative intent to prohibit other forms of equitable tolling. See, e.g., Bowen v. City of New York, 476 U.S. 467, 480 (1986) (presence of statutory tolling provision expresses Congress' "clear intent to allow tolling in some cases"); American Pipes and Construction Co. v. Utah, 414 U.S. 538, 541-542 & n.3 (1974); see also, e.g., Mamer v. Apex R.E. & T., 59 F.3d 780 (8th Cir. 1995). In both Bowen and American Pipes, this Court applied equitable tolling to statutes that had their own explicit tolling provisions.

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[12] In support of his assertion that "[t]he precision and detail" of section 2244(d) show "congressional intent to preclude individual equitable considerations," petitioner Calderon cites briefly to United States v. Brockamp, 519 U.S. ___, 117 S.Ct. 849, 850-53, 136 L.Ed.2d 818, 822 (1997). See Pet. 15. Brockamp held that a statutory time limit on filing tax refund claims was a jurisdictional bar. This conclusion was based on the statute's "detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together," as well as on the fact that tax law is not normally characterized by exceptions based on individualized equities and that "occasional unfairness in individual cases" was the "price" that had to be paid "in order to maintain a more workable tax enforcement system." 117 S.Ct. at 852 (emphasis added). The Court of Appeals distinguished Brockamp on several obvious grounds, 1997 WL 709900 *6 n.4, App.3 at A129 n.4, and petitioner fails to address any of them. Nor does Calderon acknowledge that it was the combination of factors "taken together" that caused the presumption in favor of equitable tolling to be overcome in that case.

B. Calderon's Claim That "Congress Revealed Its Intent By Negative Implication."

Petitioner Calderon's second statutory argument is that this Court's decision in Lindh v. Murphy, 521 U.S. ___, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997) "announced that Congress has in fact manifested its intent through negative implication for purposes of interpreting the AEDPA." (Pet. 17.) Therefore, the argument runs, since the AEDPA contains another habeas filing limitation -- i.e., a six-month period for filing habeas applications in those capital cases that are litigated under the "opt-in" or "Chapter 154" provisions of the Act, see 28 U.S.C. § 2263 -- and since section 2263 (purportedly) limits tolling to one 30-day extension, the absence of statutory authorization for tolling in section 2244(d) is, by negative implication, indicative of congressional intent that no equitable tolling at all be allowed. (Pet. 16-18.) This argument is meritless.

The threshold problem with the argument is that it reads Lindh far too broadly. Contrary to Calderon's belief, Lindh does not stand for the proposition that every negative inference that could arguably be drawn from the AEDPA is an inference that should be drawn. Lindh did give effect to an obvious negative implication that arose from a reading of one section of the AEDPA (not a limitations statute), but Lindh did so only after considering the textual support for the negative inference, the legislative history, the legal backdrop against which the negative inference arose, and the problems with the competing inferences. 138 L.Ed.2d at 488-94. Only because all these

factors considered together pointed in the direction of the negative inference did Lindh give voice to it.

In the case at bench, the circumstances surrounding the proposed negative inference are very different from those in Lindh. For here, unlike in Lindh, "[e]very relevant signal -- from the Act's plain language, to its legislative history, to its structure -- points in the ... direction" opposite to that of the proposed inference. 1997 WL 109900 *5, App.3 at A132. Here, for example, unlike in Lindh, the negative inference that Calderon seeks to draw would be contrary to the legal backdrop against which section 2244(d) was enacted (e.g., that limitations statutes customarily and presumptively permit equitable tolling). Here, unlike in Lindh, the negative inference would conflict with other provisions of the same Act (e.g., reaffirming the right to counsel in capital cases). Here, unlike in Lindh, the negative implication would also conflict with the legislative history (e.g., the congressional debates, and the rejection of an amendment to make counsel discretionary in capital cases).

Thus, Lindh's recognition that Congress expressed its intent through negative inference in that case has no relevance here. It made sense in Lindh to give effect to a negative inference when, as there, all other indicia of congressional intent point in the same direction. It would be another thing altogether to give effect to a negative inference when, as in the present case, the inference flies in the teeth of the other considerations.

Moreover, the very wording of the statute upon which petitioner relies for his negative inference undermines any such

inference. For, the limitations statute in Chapter 154 (§ 2263) differs significantly from the limitations provision in section 2244(d). Whereas the former states that "[a]ny application under this chapter for habeas corpus relief ... must be filed ... not later than 180 days after final State court affirmance...," the latter provides merely that a "1-year period of limitation shall apply to an application for writ of habeas corpus." Had Congress intended section 2244(d) to serve as the same kind of bar to the filing of a habeas petition as is found in section 2263, it would not have used language that differed so substantially from that used in section 2263.

In sum, then, there is nothing to either of petitioner Calderon's statutory interpretation arguments: Section 2244(d) is a mildly worded, "run-of-the-mill" statute of limitations, and there is no reasonable basis for concluding that Congress expressed its intent to make section 2244(d) a jurisdictional bar via negative inference.[13]

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[13] At several points in his petition, petitioner Calderon alludes to the Report of the Committee on the Judiciary, United States Senate, on S. 1763 (S.Rep. No. 98-226, Sept. 14, 1983) as supporting its interpretation of section 2244(d). (Pet. 7-8, 19.) However, among other problems with Calderon's reliance on the Report are the facts that (1) the Report was issued more than half a generation before the AEDPA was enacted and (2) the statutory language the Report was discussing was significantly changed before it was passed in the AEDPA. (Compare, e.g., proposed § 2244(e)(1) with newly enacted § 2244(d)(1)(A).) To the extent any inference at all can be drawn from the 13-year-old Report, the inference is that Congress rejected the reasoning used therein. See Triestman v. United States, 124 F.3d 361, 374-75 (2nd Cir. 1997) (forerunner bill is not indicative of statutory intent where language relied on was not adopted in enacted statute).

C. Petitioner Calderon's Remaining Arguments Are Meritless, Irrelevant And Inaccurate.

The remaining arguments offered by petitioner Calderon appear to be a thinly veiled effort to induce the Court to make the AEDPA conform to what Calderon thinks the law "should be" (Pet. 8). Calderon's arguments are quite alien to accepted principles of statutory interpretation and largely substitute hyperbole and aspersion for reason, precedent, and law. (Pet. 7-14.) Because most of the arguments are obviously irrelevant, real party Beeler will not answer them in detail. Three responses are called for, nevertheless:

First: petitioner Calderon asserts that allowing section 2244(d)'s one-year period to be equitably tolled will produce "indefinite delay," "eviscerate[]" the function of the statute of limitations, and "open[] the door" to "unpredictable, uneven, and inevitably arbitrary treatment, even within a single case." (Pet. 8-9.) This is unjustified rhetoric, for the reasons pointed out in the Court of Appeals's opinion. 1997 WL 709900 at *5, App.3 at A130-A131. In addition, equitable tolling has been a "traditional" principle applicable to federal statutes for well over one hundred years. See, e.g., Bowen v. City of New York, supra, 476 U.S. at 479; Honda v. Clark, supra, 386 U.S. at 501; Braun v. Sauerwien, supra, 10 Wall. at 223. Yet, as far as real party can determine (and petitioner Calderon has not cited anything to the contrary), equitable tolling has never been found to have "eviscerate[d]" a statute of limitations or produced "indefinite delay."

It bears noting that no habeas corpus statute of limitations existed before the enactment of section 2244(d). Thus, none of the supposed "endless delays" prior to the AEDPA (Pet. 7) could have been attributed to equitable tolling. Consequently, congressional concern with delay would not have translated into a desire to wipe out equitable tolling.

Second: underlying petitioner Calderon's contention about "indefinite delay" is a belief that federal district court judges cannot be trusted to exercise their equitable tolling authority properly. There is no evidence that Congress shared Calderon's disrespect for the federal judiciary, but this does not deter Calderon. Instead, after conceding that the Ninth Circuit has set a "high standard" for habeas petitioners to meet in order to obtain equitable tolling, Calderon attempts to prove that this Court should distrust the lower courts because "in actual practice no standard exists." (Pet. 11.) According to Calderon, "the district courts have equitably tolled the filing period in numerous cases," referring to eleven cases in California district courts in which equitable tolling has apparently been granted. (Pet. 10 & n.3.) But Calderon fails to mention that in approximately 45-50 pending post-AEDPA federal habeas cases in this State (by real party's count), equitably tolling has either not been sought or not been granted.[14]

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[14] Petitioner's claim that there are "numerous cases" in which tolling has been granted is misleading in another way, too. The AEDPA is a new law, and there has been much uncertainty about many important matters connected with the Act, including (1) whether the AEDPA applies to those pending cases in which

(continued...)

Calderon then purports to discuss three of the eleven cited tolling cases in more detail. In the discussion, however, Calderon omits to mention many inconvenient facts, such as (1) that federal habeas petitions were filed in each of the three cases shortly (18 days to five months) after April 24, 1997, (2) that in two cases, tolling was necessitated because of the failure of state and federal judges to act promptly on essential matters before them, and (3) that in at least one case Calderon himself stipulated to tolling for a portion of the period involved.

None of these facts bespeak of "indefinite delay" or of any refusal by the district courts to adhere to the standard set forth by the Ninth Circuit in the present case. To the contrary, the facts show that equitable tolling can be an unavoidable necessity, that it is reserved for a small minority of cases, and that habeas petitions are being filed at a much quicker pace than before the AEDPA was enacted.

Third: having accused federal judges of being untrustworthy, petitioner Calderon next proceeds to cast aspersions on counsel

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[14](...continued)
only "McFarland" applications for counsel had been filed prior to April 24, 1996, and (2) what is the implication of the AEDPA in general, and its one-year statute of limitations in particular, for unexhausted claims and for the "no mixed petition" doctrine of Rose v. Lundy, 455 U.S. 509 (1982). Uncertainty in the law has long been recognized as a basis for equitable tolling, and the uncertainty with respect to the AEDPA underlies the equitable tolling grants in many of the cases listed by petitioner Calderon (including all of the cases in which tolling was granted only as to unexhausted claims). Plainly, as clarity emerges as to the meaning of the AEDPA, the use of equitable tolling will drop significantly from the already low level that exists at the start-up of the AEDPA.

for real party Beeler. According to Calderon, (1) counsel have "shown a general disregard for any limitation for filing [Mr. Beeler's] habeas claims" and are "seeking to further extend the time" so as to produce "unlimited delay," and (2) equitable tolling was not justified in real party's case "under the strict standard established by the Ninth Circuit.' (Pet. 12-13.) On their face, these assertions would hardly warrant a grant of certiorari even if they were accurate, see Supreme Court Rule 10, and in fact neither is.

Calderon's second assertion (that tolling is not justified) is so frivolous that it was never offered to the Ninth Circuit. There, Calderon argued only that the AEDPA "is not amenable to equitable tolling" and that therefore the district court "exceeded its jurisdiction" in allowing tolling. (Pet. for Writ of Mandate at 3; see also id. at 4, 8 (caption), 10-11, 12, 14.) Calderon made no claim that the court abused its discretion under a proper application of equitable tolling principles.

As for the Calderon's first claim (that real party's counsel are seeking to inject indefinite delay into the proceedings), the assertion is equally frivolous. It is based entirely upon the fact that real party has tried to have all claims litigated in his first habeas proceedings, an effort that would seem to be warranted by both case law and the AEDPA. McCleskey v. Zant, 499 U.S. 467 (1991); AEDPA § 106(b), amending 28 U.S.C. § 2244(b). Calderon's assertion that these efforts are designed to engender "unlimited delay" makes no sense. The only way that awaiting the outcome of state exhaustion proceedings could inject "unlimited

delay" into the federal habeas proceedings would be if the state court itself "delays indefinitely" in handling real party's exhaustion petition. Thus, Calderon's current argument is actually a claim that yet another court -- now, the California Supreme Court -- cannot be trusted to do its job properly. Calderon offers no support for its belief that the state court will be so derelict in its duty.[15]

In sum: petitioner Calderon has sought to take a clear, simple and direct matter of statutory construction and transform it into an aspersion-casting battle over what the appropriate time-limitations policy "should be." That effort is inappropriate as a matter of statutory construction, and it is based on an inaccurate presentation of the facts.

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[15] Calderon also fails to explain why delays by the state court should be attributed to real party; petitioner Calderon has at least as much ability to control the pace of proceedings there as does Mr. Beeler (which is nil).

What makes Calderon's assertion of bad faith on real party's part even more egregious is that at the same time as real party filed his federal habeas petition containing exhausted claims, he sought to "expedite these proceedings" by having the unexhausted claims amended into the petition. Even though the AEDPA does not require exhaustion when there is an "absence of available State corrective process" (AEDPA § 104(1), amending 28 U.S.C. § 2254(b)(1)(B)(i)), and notwithstanding that Calderon expressly disclaimed that "there is necessarily a remedy available to [Mr. Beeler] in the state courts" for the unexhausted claims, Calderon refused to waive exhaustion and (successfully) opposed real party's efforts to amend and expedite. It is thus disingenuous for Calderon here to assert that real party's counsel are attempting to inject "indefinite delay" into the case.

IV. ADDITIONAL CONSIDERATIONS MILITATE AGAINST GRANTING CERTIORARI IN THE PRESENT CASE.

In addition to the complete lack of merit to petitioner Calderon's position, certiorari is also inappropriate in this case for two additional reasons.

First, the certiorari petition should be denied as an abusive, successive filing. Petitioner Calderon has previously sought to persuade this Court to review the very same issue as it now presents and in this exact same case. This occurred in April 1997, when Calderon sought review of the Court of Appeals' opinion immediately upon issuance, by means of a petition for writ of mandate. That petition was denied. See In re Arthur Calderon, 138 L.Ed.2d 1004 (1997). Having had one such full opportunity, petitioner Calderon should not be given another. To permit him a second bite at the apple would open the door to every dissatisfied lower-court litigant employing exactly these same tactics in the future. There is nothing in the law or in common sense that warrants such duplicative, wasteful filings.

Second, this case is inappropriate for certiorari review for an additional reason. Prior to the April 23, 1997 date on which (in petitioner Calderon's view) section 2244(d)'s one-year limitation period expired, real party Beeler had specifically been authorized by both the District Court and the Court of Appeals to file his habeas petition at a later date, and this Court declined to review those decisions both before and after that date. Real party justifiably relied upon those court rulings in filing after the April 23, 1997 date. To hold at this

late date that a petition should have been filed by April 23 would be unfair and would also amount to an impermissibly retroactive application of section 2244(d). See, e.g., Landgraf v. U.S.I. Film Prod., 511 U.S. 244 (1994).

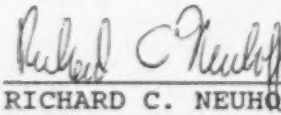
V. CONCLUSION.

The Court of Appeals has merely held that section 2244(d) embodies the traditional principle of equitable tolling which is presumptively embodied, and has traditionally been embodied, in statutes of limitation, and which is in accord with "the Act's plain language, ... its legislative history, [and] its structure." 1997 WL 709900 at *5, App.3 at 132. The Court's conclusion is straightforward, simple, and unimpeachable.

Petitioner Calderon's petition to this Court ignores virtually everything the Court of Appeals wrote and proffers nothing substantial in its place. The petition should be denied.

Dated: December 19, 1997

Respectfully submitted,

By: 

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